UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

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In the Matter of:

LEHMAN BROTHERS HOLDINGS, INC.,	CAUSE NO.
et al,	08-13555(JMP)
Debtors.	

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In re

LEHMAN BROTHERS, INC.,	CAUSE NO.
Debtor.	08-01420(JMP)(SIPA)

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U.S. Bankruptcy Court

One Bowling Green

New York, New York

January 16, 2013

10:03 AM

B E F O R E:

HON. JAMES M. PECK

U.S. BANKRUPTCY JUDGE

ECRO: TB

HEARING re Status Conferences:

1) Joint Motion of Lehman Brothers Holdings, Inc. and Litigation Subcommittee of Creditors committee to Extend Stay of Avoidance Actions and Grant Certain Related Relief (ECF No. 33322)

2) LBHI's Objection to Proofs of Claim Number 14824 and 14826 (ECF No. 30055)

3) Hearing to Consider Objections to Purported Claims Transfers to Stichting Value Foundation (ECF No. 32646)

4) Motion of Traxis Fund LP and Traxis Emerging Market Opportunities Fund LP to Compel Debtors to Reissue Distribution Checks for Allowed Claims (ECF No. 32163)

HEARING re Uncontested Matter: First and Final Fee Application of Epiq Bankruptcy Solutions, LLC, as Solicitation and Voting Agent to the Debtors for Allowance and Payment of Compensation for Professional Services Rendered and For Reimbursement of Actual and Necessary Expenses Incurred from September 1, 2011 through December 6, 2011 (ECF No. 27762)

HEARING re Adversary Proceedings:

1) Walton, et al v Lehman Brothers, Inc., et al (Adversary Case No. 12-01898), Motions to Dismiss

2) FirstBank Puerto Rico v Barclays Capital, Inc. (Adversary Proceeding No. 10-04103), Barclays Capital, Inc. Motion for Summary Judgment; FirstBank Puerto Rico Motion for Summary Judgment

Transcribed by: Sheila Orms

A P P E A R A N C E S :

WEIL, GOTSHAL & MANGES LLP
Attorneys for Lehman Brothers Holdings, Inc.
767 Fifth Avenue
New York, NY 10153

BY: MAURICE HORWITZ, ESQ.
GARRETT A. FAIL, ESQ.
JACQUELINE MARCUS, ESQ.

WEIL, GOTHAL & MANGES LLP
Attorneys for Lehman Brothers Holdings, Inc.
1300 Eye Street, N.W.
Suite 900
Washington, DC 20005

BY: PETER D. ISAKOFF, ESQ.

SEWARD & KISSELL
Attorneys for Traxis Fund LP
One Battery Park Plaza
New York, NY 10004

BY: JOHN ASHMEAD, ESQ.

HUGHES HUBBARD
Attorneys for SIPA Trustee
One Battery Park Plaza
New York, NY 10004-1482

BY: JEFFREY S. MARGOLIN, ESQ.
BETSY PRICE, ESQ.

CLIFFORD CHANCE
Attorneys for Stichting the Iamex Value Foundation
31 West 52nd Street
New York, NY 10019

BY: JENNIFER C. DEMARCO, ESQ.

SULLIVAN & CROMWELL, LLP
Attorneys for Canary Wharf Management, LTD., Heron Quays (HQ2) T1 Limited, and Heron Quays (HQ2) T2 Limited
125 Broad Street
New York, NY 10004

BY: DAVID B. TULCHIN, ESQ.
MARK DE LEEUW, ESQ.
JOHN J. JEROME, ESQ.

GIBSON DUNN
Attorneys for Lehman Brothers Finance AO
2100 McKinney Avenue
Dallas, TX 75201-6912

BY: ROBERT B. KRAKOW, ESQ.

STONE BONNER & ROCCO LLP
Attorneys for Karolina Penard
260 Madison Avenue
17th Floor
New York, NY 10016

BY: RALPH M. STONE, ESQ.

CLEARY GOTTLIEB STEEN & HAMILTON LLP
Attorneys for Barclays Capital, Inc.
One Liberty Plaza
New York, NY 10006

BY: MATTHEW VANEK, ESQ.
BOAZ S. MORAG, ESQ.
MARK E. MCDONALD, ESQ.

BRYAN CAVE LLP
Attorneys for Bank of America, N.A. and
Federal National Mortgage Association
1290 Avenue of the Americas
New York, NY 10104

BY: THOMAS J. SCHELL, ESQ.

DICKSTEIN SHAPIRO, LLP
Attorneys for FirstBank Puerto Rico
1633 Broadway
New York, NY 10019

BY: JEFFREY A. MITCHELL, ESQ.
JUDITH R. COHEN, ESQ.
STEPHANIE BIRBROWER GREER, ESQ.

MILBANK, TWEED, HADLEY & MCCLOY, LLP
Attorneys for Official Committee
One Chase Manhattan Plaza
New York, NY 10005

BY: DENNIS C. O'DONNELL, ESQ.

TELEPHONIC APPEARANCES:

ANASTOLY BUSHLER, FARALLON CAPITAL MANAGEMENT

ISSAC K. DEVYVER, REED SMITH, LLP

CHAD J. HUSNICK, KIRKLAND & ELLIS, LLP

PAUL S. JASPER, SCHNADER HARRISON SEGAL & LEWIS LLP

ADRIENNE K. WALKER, MINTZ, LEVIN, COHN, FERRIS, GLOVSKY

MICHAEL NEUMEISTER, STUTMAN, TREISTER & GLATT

CHRISTINE PAJAK, STUTMAN, TREISTER & GLATT

P R O C E E D I N G S

THE COURT: Be seated, please, good morning.

MS. MARCUS: Good morning, Your Honor, Jacqueline Marcus from Weil Gotshal and Manges on behalf of Lehman Brothers Holdings, Inc., and its affiliated debtors. We have a rather short agenda today, Your Honor.

The first matter on the agenda relates to the joint motion of Lehman Brothers Holdings, Inc., and the litigation subcommittee of the creditor's committee to extend the stay of avoidance actions.

As Your Honor is aware, we filed a motion to extend the stay on December 21st. At that time, we directed the claims agent to serve all of the avoidance action defendants in addition to the master service list. The objection deadline was January 9th, and no objections were filed by the deadline.

On Friday, January 11th, it was brought to my attention that some of the defendants in Adversary Proceeding 3547 which has 265 defendants were not served by the claims agent.

As set forth in the declaration that we filed yesterday, we immediately directed the claims agent to serve all of the defendants by overnight mail, while we pondered what to do about the situation.

Shortly after that, we decided that it would be

appropriate to adjourn today's hearing to the January 30th hearing date, which we've cleared with your clerk, provided that we could get a bridge order because the avoidance action stay and the service deadline currently expire. One is January 18th and the other is January 20th.

So, Your Honor, with that, we request that the hearing be adjourned until January 30th, and that the Court enter a bridge order. We did file a notice of adjournment of the hearing yesterday, and in the notice of adjournment, we indicated that the avoidance actions defendant in that particular adversary proceeding would have until January 23rd to object to the relief that we're seeking.

THE COURT: That all sounds fine to me. It's adjourned till the 30th and you'll get a bridge order.

MS. MARCUS: Thank you, Your Honor.

The next matter on the agenda is a status conference relating to the proof of claim filed Canary Wharf, and my partner, Peter Isakoff will be handling that.

MR. ISAKOFF: Good morning.

THE COURT: Good morning. I think there's some attorneys wishing to come forward, so let's just wait a moment.

MR. ISAKOFF: May I proceed?

THE COURT: Please.

MR. ISAKOFF: We're here today because LBHI was the

guarantor of a lease of one of its subsidiaries LBL in London, quite a large building. The claimants Canary Wharf and affiliates were the landlord, and by stipulation that was so ordered by Your Honor on September 1, 2011, they have limited their claims to $780 million.

We filed an objection to the claims last summer. They opposed them. We filed a reply last week. There are quite a number of disputed issues of English law. There are opinions of Queen's counsel submitted by both sides, and one of the issues we raise, if we were successful, would lead to the expungement of the guaranteed claim in its entirety. The others, to the extent that their claims survive would involve a number of factual issues, in addition to English law issues, and as to those, should the claim not be expunged in its entirety, we would like to have fact and expert discovery, both as to liability and damages.

We have started to try to talk about a procedure as to how to move forward here, whether to have oral argument on one or more issues before Your Honor, and then to the extent that the claims survive, proceed the discovery or exactly how to proceed. Those conversations begun this morning out in the hallway. I think it's fair to say are preliminary in nature. Have not thus far resulted in anything that we have to present to Your Honor as a way to proceed.

And I guess my suggestion would be that we perhaps set a date with some time for oral argument, and perhaps in advance of that, have enough discussions such that perhaps we can reach an agreement on precisely what issues to present at that time, or whether we should simply go into discovery, that kind of thing.

THE COURT: I'm not entirely clear on what you would be arguing on a preliminary basis, without the benefit of discovery and a full factual record.

MR. ISAKOFF: There is one issue as to which I believe the facts are effectively undisputed, and that is as part of the landlord's dealings with the tenant without our knowledge where they entered into what we've called a forfeiture letter, they reached an agreement with the tenant, that they would abandon their administrative claim for unpaid rent that had accrued to that point, in exchange for a payment of one and a half million pounds, which in the opinion of our Queen's counsel, resulted in the guarantee against -- claim against us being entirely discharged.

That is effectively a question of English law, which we could argue to Your Honor. And if we were successful, that would obviate the need for anything else in the case. But that's the one issue that really is susceptible to that type of treatment.

THE COURT: This is the first time that I can

recall that issues relating to LBL have been presented to me. To the extent that there was an argument that the administrative claim of LBL was being affected, was that a claim in this proceeding, or was that a claim in the UK proceeding?

MR. ISAKOFF: That was a claim in the UK proceeding, I believe, Your Honor, that the landlord would have an administrative claim. I believe it was -- I'm going on memory now, but about 30 million pounds for unpaid rent, it might have been dollars, I'm not sure which it was, and which was released as a priority claim, in exchange for a payment of one and a half million pounds. And obviously that increased LBHI's liability under the guarantee, because that administrative expense claim presumably could've been paid in full in that proceeding. And it's depending of our QC that that visciated the guarantee entirely, because it was done without our knowledge and consent.

THE COURT: Okay. Well, there are conflicting opinions of counsel, so it's going to be difficult to decide that without the benefit of context. And perhaps without the benefit of live witnesses. But I'll hear what the parties have to say about procedure.

MR. ISAKOFF: Okay.

MR. TULCHIN: Your Honor, good morning, Your Honor, David Tulchin from Sullivan and Cromwell for Canary Wharf.

In one respect I think we agree with counsel, and that is that there are issues of English law that are potentially determinative here, and to which no discovery is necessary. I have two suggestions about how to proceed, Your Honor, if I might. And we did try to -- we had a brief discussion about this just a few moments ago in the hallway, but were not able to reach any agreement at least thus far.

First, Your Honor, I do think it would make sense, and here's where I think we agree, for the Court to resolve English law questions at the outset. Because potentially, they are determinative. I think it would be useful to the Court to do so after you've heard from the two English lawyers, the two Queen's counsel. And I suggest that we have a brief evidentiary hearing. My guess is that it would take a day and a half for the two lawyers to testify. I think it would be helpful for the Court in understanding the contract and the issues of English law that have been presented.

For example, Mr. Isakoff referred to his QC, his opinion goes on for 43 pages. It's 109 paragraphs, not all of that, by any means, I think will be all that relevant to the type of hearing that I'm proposing. But there are some, let's say, some little nooks and crannies of English law. Our QC, whose name is Laurence Rabinowitz, of course, has views that are quite different than Mr. Millett (ph).

So before we have discovery, I think it would be helpful to have, assuming the Court has the time, of course, a brief evidentiary hearing.

And secondly, Your Honor, and this is I think more in the way of a detail, but objections to the claim were filed last August without the submission of any opinion from an English barrister. In fact, there was only a very scant mention of English law in the papers that were filed on the objection.

We responded in October with our papers, including the opinion of Mr. Rabinowitz. And it was only in reply that they came forward with their Mr. Millett, who has addressed lots of questions of English law in reply. And I wonder if we couldn't get leave from the Court to submit a brief surreply since our QC, of course, did not have the opportunity to address the issues of English law that are now being stated to be determinative of at least the preliminary stage of our claim.

And I would propose to submit a surreply, Your Honor, at the Court's convenience, perhaps in three weeks if that makes sense.

THE COURT: I have insufficient information at this point concerning the nature of the dispute between two obviously eminent English barristers, concerning a point of English law that may be familiar to justices of the high

court, but that are to me, matters of foreign law.

It is unclear to me from what you've told me, and frankly from what little I've read of this in preparing for today's status conference, whether the disagreements concerning the application of English law to this dispute are disagreements based upon unsettled law, or good faith disagreements as to the application of black letter law to the leasing question, and to the damages related to the claims being asserted.

I looked generally at the papers that you filed, and believe this to be a complex matter unless it can be disposed of as a threshold question of law, in which you're entitled or not entitled to the damages you seek.

It occurs to me that rather than simply stating yes, go ahead and file a surreply, that it would be sensible for the parties to continue the discussions that started this morning in the hallway. And for you to continue to meet and confer and to develop a well considered set of prehearing procedures relating to the evidentiary hearing that you propose.

It seems to me that some form of evidentiary hearing would be desirable, certainly from my perspective, since to read submissions is never quite as compelling, as hearing someone with a particularly well-turned English accent speak to me from the witness stand.

So my suggestion is that you should have an opportunity to respond, but I believe that that opportunity should be part of a broader understanding that the parties can reduce to writing, and I can so order relating to prehearing procedures. I'll certainly make time for such a hearing.

I would also suggest that during the course of developing this prehearing set of procedures, that the parties give some thought to submitting this issue to arbitration or mediation. Arbitration in London before perhaps a retired justice of the high court, or mediation involving someone who is, by disposition and background, an expert in matters of this sort might be useful for you to consider.

Additionally, it seems to me that the matters that are to be presented here are susceptible potentially to mediation, and that some thought be given to that. I'm not directing it, I'm not even recommending it. I'm just saying that some thought might be given to whether that makes sense under these circumstances.

MR. TULCHIN: Of course, Your Honor, happy to consider that. I think these are very good suggestions.

THE COURT: And in developing a prehearing stipulation, my suggestion is that you contact my chambers, so that you can include several hearing dates. If you think

it's a two-day hearing, let's have two days at a point in time where you would reasonably anticipate will be suitable for the occasion.

Mr. Isakoff?

MR. ISAKOFF: Yes, Your Honor, if I might just for one moment. This is a suggestion I heard for the first time this morning in the hall, to have a hearing where the two QCs testify. And it seems to me that before you were to bring them over and to try to deal with the whole list of issues that they've given opinions on, there are a number of those as to which we would want to have a developed factual record. Not just on damages, but on issues going to liability under various theories.

And it seems to us that discovery should precede the kind of effort to bring the QCs over and have Your Honor take up time with a hearing for one and a half to two days.

THE COURT: I hear what you're saying, and I'm not ready to say that you're right, but you might be. And my thought on this is that, that's a subject to be considered when you meet and confer to discuss procedures.

Additionally, it seems to me that many of the factual matters here are discernible, identifiable, and in all likelihood susceptible to a stipulation of facts, rather than the burdens of depositions or formal discovery. And my suggestion is that since the documents that relate to this,

no doubt, have already been identified, and that the individuals who know something about those, no doubt, are known to the parties. That some consideration be given to developing a list of pertinent facts that I can then take into consideration at the time of argument, with regard to how those facts should be interpreted.

MR. ISAKOFF: Your Honor, I -- in saying anything, I am, this morning, I fully understand that Your Honor is in no position to rule on any of these things. I just did not want to sit down and suggest that we were in agreement with the things that were being said here.

In terms of developing a factual stipulation, in fact, there are many things that we do not know that are pertinent here. And it very well may be we can come in with a list of stipulated facts, after we've had a chance to find out what's in the -- in our adversary's files.

MR. TULCHIN: Your Honor, if I may. I agree with the Court that perhaps this is the sort of thing that we can sit down and talk about. I'm hopeful we can come to some resolution about it.

There -- it may be that there are some facts, I'm quite sure there are some factual issues that go only to the question of damages. And those, for example, it seems to me, should be deferred until after an adjudication of these English law questions.

Those would be -- those factual issues potentially could be the subject of a great deal of discovery I think. But there may be fact issues on liability issues, and liability questions, that we can agree, should be the subject of some limited discovery. I'm happy to consider that. And I think maybe Mr. Isakoff and I should --

MR. ISAKOFF: We'll talk.

MR. TULCHIN: -- meet about this and spend some time going through the Court's suggestions.

THE COURT: We all agree, you should talk.

MR. ISAKOFF: Thank you, Your Honor.

MR. TULCHIN: Thank you, Your Honor.

THE COURT: And my suggestion is just so we can keep a watch on this, that this be an agenda item for the February omnibus hearing calendar only if you are unable to reach an understanding concerning procedures.

So that's basically a 30-day window to reach an understanding. And if you can't, to come in and explain what the problems are.

MR. TULCHIN: Very good, Your Honor.

THE COURT: Okay.

MR. TULCHIN: Thank you, sir.

THE COURT: Thank you.

MR. ISAKOFF: Your Honor, I've been handed the agenda. I'm told that the next one is a hearing to consider

objections to purported claims, transfers to Stichting The Iamex Value Foundation as to which Weil is not involved.

THE COURT: Okay.

MS. DEMARCO: Good morning, Jennifer DeMarco from Clifford Chance for the Stichting Iamex Value Foundation.

This was originally scheduled as a hearing to consider the claims transfers for six claims transfers that were objected to. My records now reflect that two of the parties have withdrawn their objections to the claim transfers, and the four other claims transfers have been -- either the transfer has been withdrawn, or the claim has been transferred back to the claimant.

THE COURT: What's going on here? I don't understand it.

MS. DEMARCO: Yeah, that's why we're here to tell you the story.

Iamex is a Dutch foundation, it's regulated by the Dutch Central Bank. It works as -- in the asset management field, is a group of funds. It also works in transferring distressed assets. Through its clients, it learned that there are fact forms and tax forms that were required to be filed by October 14th, I believe. I'm sorry, or the claimants would lose their claims, and lose their rights to distributions.

It was working with Epiq and Epiq advised it, there

were very many individual holders of claims in Amsterdam -- I'm sorry, in The Netherlands, Germany and Switzerland that didn't file the forms. It came to Iamex's attention that their asset managers were actually telling them that the forms were not necessary.

Iamex reached out to each of the claimants that it could to try to get them to file their claims. They didn't have enough time to do it. So working with Epiq, who supplied it with a list of claimants who did not file the proper tax and OFAC (ph) forms. And Iamex took the action under Dutch law, and I'm going to butcher the Dutch law here. It's called Negation Justio or Zarkquernemen (ph) and it's basically the ability of a party to go in and take control of another party's assets for its benefit to protect it.

So Iamex transferred these claims to a custodial account that it had. Got in touch with all of the claimants saying, hey, you need to file your tax forms. You need to do your OFAC forms, and it could have the claims transferred back to them. Iamex under its Dutch regulatory provisions is not capable of receiving distributions for these claims, or keeping them. They have to be tagged to customers.

So it did this action to preserve what were the distributive rights of individual creditors in these three countries. It has reached out to -- and the total that it

did under this Dutch principle was, I think, 117 claim transfers. It has reached out to each of the transferees that it could. As of today, 51 of the transferees are -- have blessed the transfers, and are filing their own forms, are getting their information together, to preserve their distribution rights.

They are having difficulty getting feedback from 50 -- I think it was the other 53, the 117 included the six parties that were here today.

So they are getting in touch with all of the claimants that are the subject to the transfers. They will either have powers of attorneys with respect to the transfers, which aren't necessary under the Dutch law. But they'd like to do it for the reference anyway, but it's not necessary.

All that's necessary under Dutch law is that the parties don't object to the action that was taken on their behalf. It's Iamex's intention that as the parties get their forms filled out, so that they have their distributions protected, the claims will go back to the claimants. And to the extent that either a claimant doesn't want this service, the claim will be transferred back to it. And it won't have its tax and OFAC forms filed, and that's just where they were as of October 14th.

But to the extent -- and to the extent that they

don't get responses from any claimants, their intent is to transfer the claims back to them in any event, far before there's the next distribution because, as I said, as a matter of their Dutch regulatory authority, they're not permitted to take the distributions without an identifying customer account.

The next question you're going to ask is why.

THE COURT: Well --

MS. DEMARCO: Because I have to say it was the question I asked.

THE COURT: I'm somewhat perplexed by all this, in that it seems as if these are not transfers for value, as much as they're transfers for purposes of protecting real parties in interest into a kind of regulatory purgatory. In which the claims are held not for distribution purposes, but for regulatory compliance purposes, if I'm understanding what you said. Do I understand it correctly?

MS. DEMARCO: I think I could add the for value piece would be that Iamex -- it's more of a non-monetary value in terms of reputation and marketing.

THE COURT: Why am I concerned with this? What -- why are we here? What's the relief, if any, that would ultimately be obtained as to any of these claims? Because it seems to me that once there's compliance, the claim goes back to the original holder. And if there isn't compliance,

this entity that I don't fully understand, I-a-m-e-x, isn't in a position to receive distributions.

So what does it do to the extent that there is a failure to comply?

MS. DEMARCO: To the extent that there's a failure to comply from the claim holders, or the original claim holders wish not to have Iamex services, then the claims will be transferred back to the claim holders.

THE COURT: So who was it that agreed in the first instance to transfer a claim to Iamex or did it get transferred by operation of law?

MS. DEMARCO: Iamex made the transfer as an independent party under this Dutch principle of Negotiarium Justile (ph) which gives a third party the ability to take custody and control of assets to protect those assets.

THE COURT: And what empowers this action, and who decides that the doctrine has been properly invoked in the first instance?

MS. DEMARCO: I'm not sure I can answer the second part here today, and I'm not a Dutch lawyer, so I can only give you my understanding of what the Dutch law is. Is that in terms of taking the action, the third party is the person who decides to take the action, but has to take the action for the benefit, and make a reasoned determination.

I would assume that the party whose property was

affected by the action, always has the ability to challenge the action as not being in its benefit, or not properly authorized.

Here, we have six parties who took -- who challenged that action, but none of the other parties have challenged the action that was taken on their behalf. And the six parties who challenged the action, of those parties, it turns out that Epiq when it provided all of this information to Iamex didn't have the up to date information. So for a few of those six, they actually had filled out their forms, and their information was up to date, and Iamex withdrew its claim transfer.

And for another one, I think it's Carolina Bernhard, the claims transfer was withdrawn, her objection was withdrawn, and she has filed all of her necessary tax and OFAC forms.

THE COURT: All right. I still have this lingering uncertainty as to why we're here. What, if any, relief would be afforded by the Court in connection with this Dutch procedure? It seems to me that it's either for the benefit of the original holder, or the original holder objects and gets it back and is not in compliance, but what if anything, is the Court supposed to do other than be told about it?

MS. DEMARCO: I don't believe we're asking the Court to do anything with respect to it. I believe that

this matter was put on because there were pending objections. They were resolved, which mooted any relief before the Court. But my understanding was that because of the situation, and the interesting facts surrounding it, that we were having a status conference to explain the situation.

THE COURT: Okay. And let me just ask one more thing, and then I'll hear from debtor's counsel on this.

In the event that an objection to the transfer is not resolved consensually, my understanding is that Iamex will simply return the appropriated claim back to the original holder in any event; is that correct?

MS. DEMARCO: That's correct.

THE COURT: Okay. So regardless of the disposition of the objection, there's never anything for the Court to do because there will never be an objection to rule on.

MS. DEMARCO: That's correct.

THE COURT: Okay. It's all (indiscernible) bizarre.

MS. DEMARCO: That was my --

THE COURT: At least from my perspective it is.

MR. FAIL: Your Honor, Garrett --

THE COURT: Mr. Fail?

MR. FAIL: Thank you. Your Honor, Garrett Fail, Weil Gotshal for Lehman Brothers Holdings, Inc. Just to

follow-up on that. The reason that this was scheduled as a status conference was because the debtors and the claim agent noticed the number of claims transfers and the numbers of objections that were filed to the transfers of claims, followed by the withdrawals. And without knowing the facts behind it, wanted to bring it to the attention of the Court. And we notified the Office of the U.S. Trustee, of what we perceived to be an irregularity in the trading of claims without permission of claim holders.

I have no reason to dispute or -- you know, we have no facts or knowledge to dispute anything Ms. DeMarco has said today. And there was nothing before Your Honor to rule on. This was a status conference to clear the air I think. And one of the claimants is actually here, one of the claimants, the transferor is here, and he may wish to --

THE COURT: Do you have anything to say, sir?

MR. STONE: Yes, Your Honor. I'm Ralph Stone, I represent Carolina Bernhard. She withdrew her objection after Iamex withdrew its transfer. So I'm really here as a friend of the court.

I find the whole thing not just bizarre but extremely suspicious. I have no reason to question the representations about Dutch law and the rest, but Carolina Bernhard has not been wandering around Germany, no one reached out to her. The first notice that she received of a

transfer of her claim was a notice of a hearing to object, or of an opportunity to reject to the transfer, which attached among other things, these transfer documents that are assigned by Iamex, as both transferor and transferee, which just smacks of exceedingly strange.

I was simply retained by German counsel to Ms. Bernhard to serve as a go between so that they could file their objection. But anybody who hears of this does a little bit of Googling and looks at the docket, and sees that Iamex has transferred in excess of a hundred claims, and I'm told it's done out of the goodness of their hearts, which I find rather hard to believe.

And so the reality is that these transfers are, if you look through the list of them, they all involve largely smaller claimants, people with a hundred thousand or tens of thousands in claims, are individuals or small business pension funds who were sold these late Lehman notes, which were peddled to widows and orphans throughout Europe just before collapse of the firm.

And these are the sorts of people for whom English is not their first language. They received these -- a notice from the Court, which is Mr. Bernhard's instance, was the first time she ever even got word that her claim had been transferred.

It sounds to me like either a fraudulent transfer

process has been set up in a place that's basically outside the jurisdiction of this Court, or somebody has stumbled on a fantastic business plan.

THE COURT: Well, after that interjection, I suspect counsel will want to respond to, to establish the legitimacy of her client.

MS. DEMARCO: I certainly would, and I find it somewhat surprising since his client withdrew her objection. So I'm not sure the purpose of the speech since they specifically --

THE COURT: I think he wishes to point out that the circumstances to an outside observe seems suspicious.

MS. DEMARCO: I can understand that they appear how they appear. Iamex actually did mass mailings right after it did this transfer. It tried to get in touch with people beforehand, but Epiq gave them the list so close to the October 14 deadline that it was impossible to get in touch with everyone and get their forms filed.

So this was what was viewed as, at the time, and I probably viewed in retrospect, differently as an inexpensive marketing effort to show customers in their home jurisdiction that they take better care of their customers than the asset managers, who had advised all of these parties not to file these forms.

I think if they had seen at the time, that they

would then have to hire someone to come to the U.S. and defend the position, they probably wouldn't have spent the resources doing it. It's less of an inexpensive marketing issue to do it then. They did it free of charge.

THE COURT: Let me ask a very basic question. Is there no fee associated with the transfer of the claim and the transfer back? Is it a completely free of charge appropriation and then transferred back?

MS. DEMARCO: Yes, it is. Iamex Fund itself, and this fund is in the business of a platform of purchasing and selling distressed assets. So to the extent any of the claim holders want to pool their assets and sell them, which is their choice, there would be a commission associated with that. However, that's not a requirement.

So this was really probably an ill conceived marketing effort.

THE COURT: I don't understand that characterization. What do you mean by an ill conceived marketing effort?

MS. DEMARCO: I mean that it was a marketing effort that was -- that it was an action that was taken under Dutch law, that was taken, as I'm advised, appropriately under Dutch law with respect to the assets. There's a cost involved in doing all of this, and Iamex has now been subject to the costs involved in it, including hiring

counsel and reimbursing certain parties who have had counsel, because they believed that it should be absolutely neutral to the claimants that they took this action.

So in circumstances where there was a counsel who objected, they reimbursed the counsel.

THE COURT: Okay. I -- the more I hear about this, the more confused I become, and at least in this respect. Did your client take this action under color of applicable Dutch law? Because it is in the business of trying to acquire claims and thereby generate commissions from the sale of those claims? Or did it do this because it is a quasi fiduciary that was attempting to provide a benefit to (indiscernible) finding claim holders who would not be able under applicable law to receive distributions (indiscernible) compliance with the various local requirements of law?

MS. DEMARCO: It's more the latter, Your Honor. The Iamex Fund is part a family of funds which are asset managers. And as asset managers, they owe duties to their customers. They understood that there were these individual parties, many of whom were elderly, many of whom are on pensions that were being told they did not have to file these forms to receive distributions. And they believed that they should provide a vehicle for which these pension holders could.

We're not talking about large sums of money here that anybody would make any money through sales or the like. I think the aggregate of the six parties who objected was a claim of 1,072,000, the aggregate. And in terms of the others, I think we're talking -- I think that the aggregate of the remaining is $10 million in face amount of claims.

We're not talking -- and many of the holders are 14,000, 20,000, 6,000, we're not talking about any kind of a commission that someone would take all of this action to do. This was really about protecting individual claimants in other countries who were being told that they didn't have to file these forms. And Iamex wanted to demonstrate that it actually took care of its clients.

THE COURT: Now, were these individuals clients, or were they strangers?

MS. DEMARCO: They were strangers.

THE COURT: And they took this action under color of law because they were advised by Dutch counsel that they had the ability to act on behalf of parties who were not customers, and with whom they had no relationship and no duty to act, correct?

MS. DEMARCO: Correct.

THE COURT: That's pretty peculiar, but thanks for the report.

MS. DEMARCO: If it would make anyone feel more

comfortable, I'm happy to touch base on the status of the remaining claims over the next month, so that everyone can be assured that this isn't some sort of a scheme to --

THE COURT: I don't know that I need a further status report, as long as I have a representation from counsel that these claims will, in all respects, be returned without cost to the original claim holders, and that this is, in effect, an entity acting as a volunteer for the benefit of third parties, thereby assuming a responsibility by virtue of volunteering to those third parties, and will, in all respects, act in the benefit of those third parties including returning the claims to those parties without compliance with local regulatory authority or with it. Whatever the claimant wishes. As long as the claimant's wishes are paramount, I don't need to hear about it. But if any party complains, I want more than just a status report, I'll want an explanation in great detail, and I'll probably want a representative of your client to explain.

MS. DEMARCO: I understand.

THE COURT: Okay.

MR. FAIL: Thank you, Your Honor, Garrett Fail for Weil Gotshal again. The next item on the agenda is a motion of Traxis Fund LP, and Traxis Emerging Market Opportunities LP to compel the debtors to reissue distribution checks for allowed claims. Counsel for Traxis is here, and I propose

that they go first.

THE COURT: Okay.

MR. ASHMEAD: Good morning, Your Honor, John Ashmead of Seward & Kissell on behalf of the Traxis Funds.

Your Honor, I'm not exactly sure how you'd like to proceed. I will say that we have submitted affidavits. The plan administrator has submitted an affidavit. We are happy to proceed with oral argument. We don't know that there's a need for an evidentiary hearing, unless Your Honor would like to have live witnesses here, although we don't think that the matters covering the affidavit are of the type that should require that, given that it's not about promises, or understandings, or calculations, or damages. It's simply about what someone's mail procedures were. And we're happy to request our affidavits, and actually just go straight forward to oral argument.

But before we go further, I'll leave that to Your Honor and debtor's counsel.

THE COURT: Well, you're going to have to explain what you've just said because this was listed on the agenda as going forward solely as a status conference.

MR. ASHMEAD: Uh-huh.

THE COURT: Rather than on the --

MR. ASHMEAD: Uh-huh.

THE COURT: -- merits. You're now saying you're

prepared to go forward on the merits. I need to understand what's going on.

MR. ASHMEAD: Your Honor, we are prepared to go forward on the merits. There may have a miscommunication, or lack of communication with Mr. Fail, but we were surprised when we saw the agenda last night after hours when I saw it, and it was listed as a status conference. But we're prepared to go, or if we need to put this out in the near term, we hope would be the near term, we're prepared to argue then or now.

THE COURT: Let me hear from the debtor on this.

MR. FAIL: Your Honor, this is an unfortunate situation, and the plan administrator is sympathetic to Traxis' situation.

This was listed as a status conference, because I understood that we wouldn't be putting on witnesses in support of the affidavits or cross-examining each other's witnesses, to the extent that Traxis wants to proceed with oral arguments, we're happy to respond, and the plan administrator seeks Your Honor's direction in terms of how to proceed, perhaps after the argument.

THE COURT: Well, this sort of leads me to make a general observation about the agenda. As I think everyone has come to recognize, given the volume of matters that have arisen over the years in the Lehman case, the Court places

considerable reliance on the agenda process for our own preparation for hearings.

And when a matter is listed as going forward solely as a status conference, that is a signal that while I will pay attention to the matter, I will not necessarily delve into it with the same depth and level of preparation as a matter which is going forward on the merits.

I noted for example, that the next agenda item involving the final fee application of Epiq Bankruptcy Solutions showed up as an agenda item last evening after 9:30. And while it turns out to be not a controversial matter, I nonetheless spent some time this morning taking a look at that, and I would not otherwise have paid attention to it.

So to the extent that there is some issues relating to the monthly agenda, I'll simply make the general comment that, I think maybe we need to pay closer attention to the timing of both adding and withdrawing items from the agenda. And also making sure that there's symmetry between the plan administrator and parties in interest, as to whether matters are going forward as a status conference, and what it means for a matter to go forward as a status conference, or whether they're going forward on the merits.

Now, that having been said, I know generally what this motion is about, and I know generally what the issues

are. To the extent that it is important that this proceed today, I can listen to argument on the merits. But I think it might be better, assuming parties are not prejudiced by delay, if this were to be adjourned to the next omnibus hearing, when I'll have more of an opportunity to pay attention to the various affidavits that have been submitted.

Because while I reviewed the papers, I did not review the evidentiary submissions.

MR. FAIL: Thank you, Your Honor. I apologize to the Court and to Traxis and its counsel for the oversight and for the misunderstanding. There would be no prejudice to Traxis in terms of receiving a distribution in the third distribution should Your Honor be so inclined to rule in its favor, and if this were to go forward, either of the February omnibus hearings, or I think the January 30th claims hearing is -- looks like it’s a full calendar but I defer to counsel for Traxis.

MR. ASHMEAD: I'm sorry. Since we're just having a bit of discussion, I'll speak from this mic, Your Honor.

Look, I take Your Honor's comments and I want Your Honor to be in the best position to rule on this, and to make it as most efficient as possible, and not to abrupt or change your calendar. It's unfortunate that happened. I don't think there was mal intent, maybe a lack of

communication, misunderstanding, and I accept Mr. Fail's statements.

So on that, it is my client that spent a fortune to defend what ultimately, you know, we're eating very much into that amount that's at stake. So we would like to get this resolved as soon as possible. We think we have a slam dunk case. I would like --

MR. FAIL: If Your Honor is prepared to entertain the argument, we're happy to respond today.

THE COURT: Well, as I said, you can refer to the affidavits in support of your position, but I haven't reviewed those in advance. I do know what the issues are.

MR. ASHMEAD: Uh-huh.

THE COURT: And if you want to argue them today, that's fine, but I'm probably going to be in a position to rule today anyway, because I will need to take some time to review the affidavits.

My suggestion is that this be adjourned to either the January 30th claims hearing, because this is claims related, or to the next omnibus hearing.

MR. ASHMEAD: Your Honor, that's what I was -- my little speech, but that's what I was going to suggest, just that we keep it on a tighter leash, and I'm just scrolling through my calendar, and let me put on my peepers here. We would like to go forward, and we're going to take Your

Honor's recommendation, and we understand the position Your Honor is in. And we would ask that it go forward on January 30th.

THE COURT: Fine. Even though I think we have a full calendar, this will simply be one more item on that full calendar.

MR. ASHMEAD: Your Honor, is there a time? Is that a 10 a.m. standard calendar?

THE COURT: Yes.

MR. ASHMEAD: Okay.

MR. FAIL: Thank you, Your Honor.

MR. ASHMEAD: Thank you, Your Honor.

MR. FAIL: The next item on the agenda is Epiq's final fee application. James Sullivan from Epiq is here in the courtroom today, Your Honor. There were no objections and we contemplated and were in discussions with Epiq with respect to whether or not to file a certificate of no objection, that might account for the late addition. We realize that there were no certificates of no objections filed for other fee applications. So we wanted to give the opportunity to go forward with the hearing.

THE COURT: It's an uncontested application by Epiq. I've taken a look at it. It seems fine to me, and it's approved.

MR. FAIL: Thank you, Your Honor. With your

permission, we'll submit an order with respect to the Epiq matter to chambers following the hearing.

THE COURT: Okay. And --

MR. FAIL: And we'll submit the bridge order following directly to the hearing to your clerks.

THE COURT: Fine. I think that concludes the morning calendar, and we'll resume at 2 o'clock this afternoon, and I'll see you later.

MR. FAIL: Thank you.

THE COURT: Thank you.

MS. MARCUS: Thank you, Your Honor.

(Recessed at 10:55 a.m.; reconvened at 2:03 p.m.)

THE COURT: Be seated, please, good afternoon.

MR. MARGOLIN: Good afternoon, Your Honor. Jeffrey Margolin for the SIPA Trustee.

Your Honor, the first matter on the agenda for this afternoon is the trustee's and Bank of America's respective motions to dismiss the Walton adversary proceeding.

For background, Your Honor, back on December 11th, the trustee moved to dismiss the complaint as against LBI as the complaint failed to plead the elements of a quiet title action under Georgia law against LBI, and insufficient service of process.

Motion to dismiss was served on Mr. Walton, counsel for the plaintiffs, by the trustee's noticing agent via

email and overnight delivery. At the December 12th pretrial conference, Your Honor may recall that you instructed the trustee's counsel to take further measures, to advise Mr. Walton of the outstanding motion to dismiss.

A certified letter and copy of the motion to dismiss was sent to Mr. Walton promptly thereafter, and he was emailed several times regarding the motion to dismiss, the response deadline, and today's hearing as well.

My colleague, Betsy Pierce, who's in the courtroom today spoke to Mr. Walton on December 20th, at which time Mr. Walton again indicated that the plaintiffs would be dismissing the complaint as to LBI. We sent Mr. Walton the email and draft stipulation of dismissal. And again, after repeated efforts, have not received any response.

THE COURT: I'd like to hear a rendition of the conversation that actually took place with Mr. Walton. It's still hearsay, but I'd like it not to be double hearsay.

MS. PIERCE: Good afternoon, Your Honor, Betsy Pierce.

Mr. Walton called my line directly inadvertently thinking he was calling another counsel on another matter, and when I refreshed his memory as to our relationship, and then prompted him about the previous discussions we've had, where he's indicated that he would be willing to dismiss LBI, he then seemed to recall who I was, the matter, and

said that he would still be willing to do that, and that he would call me the next day.

And following up to that phone call, we provided the stipulation of dismissal to Mr. Walton. He never called me back and never responded further.

THE COURT: But he stated to you unequivocally, I have no intention of pursuing LBI in the bankruptcy court and you have my consent to dropping LBI as a party, is that more or less what he said?

MS. PIERCE: He definitely did not use as many words, but he was -- he recalled the previous discussions we'd had about dismissing LBI, and he agreed that he would be willing to dismiss us from the suite.

THE COURT: Can you, to the best of your recollection, tell me the words he actually used.

MS. PIERCE: The conversation was a little convoluted, because he was not initially recalling who I was in the matter.

THE COURT: He called you by mistake.

MS. PIERCE: Yes, correct. But when I reminded him that we'd spoken on previous occasions, specifically right before the Thanksgiving holiday, and he had provided us with documentation regarding -- further documentation in the case, saying that he would be willing to release us. When I reminded him about this, he said, oh, yes, yes, that's

right, I think we could probably go ahead with that, I'll call you tomorrow and we'll discuss further.

THE COURT: Was there any condition imposed, for example, earlier papers filed by the trustee indicated a willingness to execute documentation releasing all claims to the property in Georgia?

MS. PIERCE: That was the understanding that I had of his expectation, of Mr. Walton's expectation.

THE COURT: And is it your understanding that his willingness to discontinue the litigation as to LBI was or was not conditioned on the trustee issuing some kind of release of all claims with respect to the real estate?

MS. PIERCE: It's my understanding that that was his understanding, based on the offer that we had initially made in our first interactions with Mr. Walton, that we would be willing to do that.

THE COURT: Okay. Thank you.

MS. PIERCE: Thank you, Your Honor.

MR. MARGOLIN: And, Your Honor, the draft stipulation of dismissal did include that release, which we sent to him, and never heard back from him regarding that.

As further described in the statement in further support of the trustee's motion, as of this date, Your Honor, the plaintiff have -- the plaintiffs have not filed or served any pleading whatsoever regarding the motion to

dismiss, requesting an extension of the response deadline, or requesting an adjournment of today's hearing.

It appears to us that neither Mr. Walton nor his clients are in the courtroom or on the telephone.

THE COURT: Let's confirm that. Is there anyone in the courtroom, or is there anyone on the telephone representing the Walton plaintiffs?

(No response)

THE COURT: There's no response. So I conclude that they are not here either in person or by telephone.

MR. MARGOLIN: Thank you, Your Honor. Therefore, for the reasons described today, and further set forth in the motion and the trustee's supporting papers, we respectfully request that the Court enter an order dismissing the complaint in its entirety against LBI with prejudice.

THE COURT: The complaint is dismissed as to LBI. And to the extent that Mr. Walton's agreement not to press claims as to LBI was conditioned on there being a release by the trustee, I'm going to request that such a release be granted if it is requested. But the dismissal is in no way conditioned upon that.

MR. MARGOLIN: Thank you, Your Honor. We, of course, would pursue that. If it's all right with Your Honor, we'll submit a proposed order to chambers.

THE COURT: Yes, that's fine. Now, we also have other parties.

MR. MARGOLIN: Thank you, Your Honor.

MR. SCHELL: Good afternoon, Your Honor. Thomas Schell representing Bank of America, N.A. and Federal National Mortgage Association.

Your Honor, we submitted a motion to dismiss on different grounds initially based on jurisdictional grounds, as well as alternative relief for abstention or transfer of venue. We served those by e-mail and First Class Mail, and initially, and then subsequent -- pursuant to Your Honor's request at the pretrial conference, we've subsequently provided that several times again both by overnight mail and electronic mail to --

THE COURT: Did you have any contact, or did anybody in your office have any contact with Mr. Walton?

MR. SCHELL: I have not personally. My associate, Elizabeth Kukura had a telephone conference with him on one occasion, I believe about extending the time to respond. And I actually have -- we actually submitted a stipulation extending time to respond to the complaint, which he did respond to by email, indicating that he did not -- this is October 31st, it was one or two days after Hurricane Sandy, and he -- after he'd initially expressed a willingness to extend the time by that email, he said he would not, and

that he -- because at the -- there were eviction proceedings going on in certain of the properties. His complaint was -- you know, this complaint was filed after I think at least one of the properties had undergone a non-judicial foreclosure, and I believe maybe a sale.

But her conversation with him at that point was only about just extending the time to respond to the complaint. And subsequently she'd reached out to him, but had received no answer, and we've sent multiple emails to him since, but we've received nothing in response, other than that one email from the same email address that we'd be using to provide multiple copies of these papers.

THE COURT: Okay.

MR. SCHELL: So, Your Honor, we actually wholeheartedly agree with the SIPA Trustee with respect to his argument, and motion to dismiss, and would ask that we join in that as well and be dismissed for the same reasons.

We've also --

THE COURT: What would the reasons be for a dismissal as to your clients?

MR. SCHELL: Well, Your Honor, as set forth in the trustee's papers, they did not -- their allegations fail as a matter of law, because they did not adequately provide the plats and other -- you know, they did not satisfy the provisions of the Georgia statutes.

THE COURT: Well, I think the situation as to your clients may be different from the situation as to LBI. And I'll note that one of the alternative grounds for relief that you seek is a transfer of the litigation to Georgia.

MR. SCHELL: Yes, sir, although preferably we would --

THE COURT: I'm sure you'd much prefer for the case to be dismissed.

MR. SCHELL: And I think we have -- you know, our jurisdictional basis is, you know, that -- we believe that's a strong ground for dismissal on jurisdictional grounds at least.

THE COURT: One of my concerns here is that this is close to a pro se litigation, even though Mr. Walton apparently is a lawyer, but he's also plaintiff in the sense that his economic interests are impacted. Based upon the pleadings, it does not appear to me that Mr. Walton is well versed in bankruptcy practice. And the decision to name LBI represented the only jurisdictional nexus to the bankruptcy court. That decision appears to have been either a tactical one or a mistake. Either way, he has now elected not to press claims as to LBI.

It is much less clear to me that he has chosen not to press claims as to your clients. And it's also less clear to me that he may not actually have some claims as to

your clients, I simply don't know the facts.

To the extent the dismissal would be based upon inadequacy of pleading, I would much prefer that a court of competent jurisdiction in Georgia make a decision as to the adequacy of pleading. And so my inclination is to transfer venue of this case to the Northern District of Georgia, with the understanding that it is, in all respects, without prejudice to your rights to continue to press your motion to dismiss, and also without prejudice to Mr. Walton's rights to appear and be heard on the merits of that before a more convenient forum.

MR. SCHELL: I understand, Your Honor. Could I also ask if we also were never served, and there's no record of -- at least we have no record of service, neither Bank of America nor Fannie Mae, and there's no affidavit of service, so on that ground I would ask that it be dismissed.

I just -- Your Honor, you know, I understand that he is one of the plaintiffs, but he is an attorney, and the -- you know, a summons was issued, he has not satisfied the procedural prerequisites. We would just ask if it be dismissed on -- or if it be -- rather than be transferred, that it be dismissed, if he's required -- you know, if he wishes, he can reinitiate this proceeding in Georgia, but I just think that would be a more appropriate way of proceeding with him, rather than transferring it, where we

still haven't been served. Because then we'll be forced to make a -- whatever motion to dismiss we'll make in that jurisdiction, we'll have to raise the fact we haven't been served, and there will be a procedural issue there.

THE COURT: I hear you and I understand your argument, but I am inclined to simply transfer the litigation in its present posture to a court of competent jurisdiction in Georgia, where a judge in the transferee jurisdiction can assess the adequacy of the pleadings, the adequacy of service, and can deal with this on the merits, as opposed to having a bankruptcy court in the Southern District of New York, deal with what is, by its very nature, a local issue.

MR. SCHELL: I understand, Your Honor.

THE COURT: So I'll entertain an appropriate order.

MR. SCHELL: Thank you, Your Honor. I'll -- may I submit that later today?

THE COURT: Yes.

MR. SCHELL: Thank you.

MR. MARGOLIN: Thank you, Your Honor. May we be excused?

THE COURT: You may.

MR. MARGOLIN: Thank you. And I suppose others will take your place in a moment.

(Pause)

MR. MITCHELL: Your Honor, do you have a preference to sides of plaintiff and defendant?

THE COURT: You're going to have to choose your own sides.

MR. MITCHELL: Thank you.

(Pause)

THE COURT: Do you have any agreements to the order of presentation?

MR. MITCHELL: Yes, Your Honor, we do. FirstBank will proceed first.

THE COURT: Okay. Let's proceed.

MR. MITCHELL: Thank you, Your Honor. Jeffrey Mitchell from Dickstein Shapiro. I'm here with Judy Cohen and Stefanie Greer also of my office.

This case has been pending for quite a while. It's our first time in front of you really to discuss any substance, and we're glad to finally have the opportunity to do that. We've disputed this case with Cleary for many years, and now we finally have a chance to share with you, as we have in the papers to talk about here, some of the evidence that we've uncovered and learned about during discovery, and to learn whether the way we interpret the facts of this case are, in fact, reasonable and correct.

We have two different views arising from a common set of facts. I think we generally agree with Barclays as

to what the facts are, it's what the impact of those facts are in this particular case.

THE COURT: Let me ask you an initial question, and this is actually a question for both of you. I note that each side has retained experts, and that the experts prepared reports. To what extent is expert opinion relevant to a decision for either side? And if it is relevant, to what extent should I be taking testimony in connection with the pending motions?

MR. MITCHELL: That's a good question. There are two aspects of the case, Your Honor, and as I walk through it, you know, I think it'll become clear. The first part of the case, or the first part of our position is that the FirstBank collateral, I'll refer to it as the FirstBank collateral. I understand that Barclays takes the position it was no longer collateral in the hands of LBI. But I'll refer to it as the FirstBank collateral.

We claim the FirstBank collateral is not covered by the asset purchase agreement and clarification letter. And therefore, was not a purchased asset. If the Court agrees with that interpretation of the operative documents, then expert testimony is not particularly relevant to that examination.

The second aspect of the challenge to title that Barclays claims is whether or not the FirstBank collateral

was an asset of the LBI estate. I think the expert testimony is important with respect to that issue. Barclays' expert testified and admitted on examination that FirstBank properly listed the collateral as its own asset, on its own books and records, even after the repos that we've learned about during discovery, the repos from LBSF to LBI of that collateral. And that in his opinion, it was appropriate for that to be listed as its own asset, even after those repos.

So I would think that that expert testimony for Barclays' own expert, the admission of that is important. And I think the testimony of our expert, who is one of the foremost authorities on ISDA master agreements had never seen a case like this. And his testimony was that the idea or notion that the use of collateral by repo of -- by an affiliate repo to deprive the party that posted collateral of its interest and rights in that collateral was never contemplated by ISDA and the ISDA agreements.

And the circumstances presented in this case were unique and a one-off. And he has substantial experience and capability of testifying to that. He's a professor at the University of Utah, and I think he's considered one of the foremost authorities, he's published extensively on ISDA, never saw it before, so his opinion about what should happen here I think carries great weight because he has written

about and contemplated many circumstances. But never the circumstance that occurred here. It was beyond -- I forgot the exact words he used, but it was beyond comprehension what happened here.

The idea that one act, unknown to the party that posts collateral, that internally, not an external repo of your counterparty to some -- to the market, the third party, but some secret unknown internal repo among affiliates, on top of that, a repo to the party that's already the custodian of the collateral, executed exclusively by employees of the custodian on behalf of both parties, without notice to anyone in the world, to Your Honor, to anyone, that that was sufficient to deprive a party, the post collateral of its rights in its own collateral. And I think that that would carry great weight. And I think if we get to that issue, I think expert testimony is important.

The expert provided by Barclays was not an ISDA expert. He was a -- and I think from the standpoint of the two experts together, our expert was somebody who studies and teaches and lectures on ISDA agreements. Their expert was a person from the industry, employed by a broker dealer, also had never been -- also admitted, he never saw this situation before, and I think you had both experts dealing in a world of unknowns, and I think, you know, the expert testimony with respect to that I would say, you know, we

provided an expert who is the right expert for this particular circumstance.

THE COURT: Let me find out from counsel for Barclays if he has any comment with regard to the use of expert testimony in connection with the pending motions.

MR. MORAG: Your Honor, Boaz Morag on Cleary on behalf of Barclays. We don't believe that expert testimony is relevant to the motions or necessary for Your Honor to consider.

The issue is one of contractual interpretation, interpretation of Your Honor's sale order. The expert that -- the experts, frankly, really at bottom, are all addressing legal issues. The facts are not disputed as you heard, and it's the legal consequences of those facts.

To some extent, Professor Johnson, their expert, is offering you his legal opinion. Our expert can't do that because he's not a lawyer, but we don't rely on that. We don't think it's really relevant. It's some background of understanding of the industry, but it certainly shouldn't detain you from considering this threshold issue, are these purchased assets under the terms of the sale order. And frankly we think that's the end of the analysis that Your Honor has to do.

We, in fact, proposed to FirstBank that we can -- we don't need experts in this case, and we should just

present to you the legal issues, and be able to truncate some of this lengthy proceeding. They decided they wanted to get all the -- everything conceivable done first, so we had to go out and get an expert. But we don't think it's relevant to this motion.

THE COURT: Okay. Thank you.

MR. MITCHELL: Thank you, Your Honor. So turning to the argument. You know, we're here in this court, this is a diversity case originally brought by FirstBank in district court as the Court knows. In FirstBank's view, a decision in this case will have no affect on the Lehman estate.

The issue before the Court is whether the collateral posted by FirstBank with LBSF to secure swaps, obligations, was a quote, purchased asset, as defined in the clarification letter between Barclays and LBI.

THE COURT: Well, your very articulation of the issue takes it into the jurisdiction of the bankruptcy court because of the implication that that assertion has with respect to the final sale order.

MR. MITCHELL: And I think -- that's why we're here. I understand why we're here, and Barclays claims that the -- it was a purchased asset, and therefore, bound by the order entered by the Court. But if the Court finds that it was not a purchased asset as FirstBank alleges, that's the

end of the case.

THE COURT: Let me ask you a threshold question. My understanding is that the parties have stipulated that the appropriate cut off date for permissible hypothecation of collateral under Section 6(c) of the ISDA master agreement was September 15, 2008.

As I understand it, the repos that you challenge between LBSF and LBI, that transferred the collateral from LBSF to LBI, and that thereby enabled LBI to aggregate the collateral with other assets in the New York Fed repo, which was taken out by Barclays on September 18, and became the subject of the sale order on September 19 and 20.

My understanding is, that the transfer from LBSF to LBI in the first instance represented a permissible hypothecation. Do you agree with that?

MR. MITCHELL: Whether there was a permissive use? Yes, I would agree with that. That would be the permissive use.

THE COURT: To the extent that that was the permissive use, why does that not end your case right now?

MR. MITCHELL: Well, first of all, that's the second part of whether it's an asset of the estate. I don't think that gets to whether it's a purchased asset or not. I think the Court would agree that all assets owned by LBI were not necessarily purchased assets. Only assets that

were assets, that were used in connection with or for purposes of operating the business.

So whether or not it's owned by LBI is not the be all and end all, I think that's the second analysis. But I can go to the second part first. Why that would not change things.

The use, and this also gets to the expert testimony, but the use made of the collateral was open repo, not time repo. An open repo can be closed at any time. The undisputed evidence, from Barclays' own witnesses, is that an open repo is the type of repo that enables the repatriation of whatever was sent out back.

Also, a repo is not -- for Barclays to prevail that the repo is the be all and end all, especially a repo like this, and obviously we've challenged certain aspects of the repo. We -- during discovery, I -- there are things that we learned about these repos that make the repos themselves not necessarily something Barclays knew at the time, but the repos themselves are highly questionable.

But putting aside, let's assume they're even not questionable, it's not -- they're arm's length repos. These are open repos. Meaning that the moment LBSF can no longer use the collateral, the repo is over.

Now, we're talking about incestuous relationship between the two parties. The asset comes back to LBSF and

now becomes collateral. So from September 15 forward, which I think is a critical -- we agree, that's a critical day. From September 15th forward, those repos were finished.

Now, I -- you might say to me, why, how can I say those repos were finished based on the evidence in this record. Well, we presented to the Court a series of emails that clearly it's undisputed on this record that FirstBank had no notice of these repos that LBSF made to LBI. And throughout its relationship with LBSF continued to receive account statements. And those account statements reflected that the collateral was owned by FirstBank.

We also have the testimony that notwithstanding those repos, FirstBank, from their own expert, properly continued to list even after the repos, the assets as their own asset on their own books and records, because collateral doesn't belong to the party -- doesn't belong to the secured party, it belongs to the party that posts it.

So at the time of the sale order hearing, there was nothing in any document, record, LBSF wasn't even in bankruptcy, to put FirstBank on any kind of notice, inquiry or otherwise, that collateral in the hands of a non-bankrupt party LBSF was even at issue in a bankruptcy case.

And shortly after FirstBank -- FirstBank goes on to its website, it can't get in, Barclays has taken over, there are communications that it has, including communications

with Barclays, but FirstBank retains counsel, Clifford Chance. Clifford Chance reaches out to Weil Gotshal and Hughes Hubbard. Weil Gotshal, a party -- a counsel that helped draft, the principal draftsperson -- draftsman of the clarification letter; Hughes Hubbard, counsel for the trustee, the record shows, and Mr. Morag is going to present to you a demonstrative exhibit that goes through these emails.

FirstBank reaches out to Hughes Hubbard and Weil. Weil reaches out to Barclays. Barclays, by former employees of Lehman, responds to Weil. And that response is later transmitted to FirstBank after a series of behind the scenes emails that the collateral is still at LBI being held pursuant to the custody agreement.

That's not all. Because we also know, Mr. Morag has made a point of this in the papers, he says, these employees -- the documents speak for themselves, they're very clear, but clearly there's a reach-out, FirstBank wants to find its collateral. It's told it's being held by LBI. Subsequent to that it negotiates with LBSF for months. LBSF for months over close-out figures, in order to obtain a return of the collateral, and isn't told until June 2009 that LBSF or LBI no longer has the collateral.

But the most important fact, Your Honor, why these repos were not repos that transferred title to LBI, is the

claim LBI files in the LBSF bankruptcy in January of 2009, which is -- Weil Gotshal, after all of these exchanges, it's stipulated Exhibit 15, which is the claim filed by LBI. LBI files a claim -- LBSF files a claim in the LBI bankruptcy, I may have misspoken, LBSF files a claim in the LBI bankruptcy, page 3 of the claim. "Claim for securities as of September 19, 2008; LBI owes me securities; Answer, Yes." And then there is a redaction.

And then on page 7 of 23, unredacted, is a list of each of the FirstBank CUSIPs. And then subsequent to that, if you go back further in the document, is a copy of an amendment agreement, which is an agreement, the amendment agreement that amends the custody agreement, pursuant to which LBI held the FirstBank securities as collateral on behalf of LBSF, and it lists FirstBank as one of the parties for whom LBI was holding the securities for LBSF.

So Weil Gotshal after investigating the claim by First Bank, after inquiring of Barclays, and looking at that email exchange, in January of 2009, filed a claim in the -- LBSF, Weil Gotshal on behalf of LBSF files a claim in the LBI bankruptcy, to recover FirstBank's securities.

If those securities were, in fact, an asset of LBI, owned by LBI, everybody knew it, it was so abundantly clear, Weil Gotshal certainly would've known. Now, there are other cases in front of Your Honor they cited in their papers,

where at the same time, without a record, there were other parties that said, my collateral, or my property ended up sold. Interestingly, Your Honor issued a decision, Weil Gotshal did in other cases take the position that yes, the collateral was, or the assets were mixed into the assets and were sold, but not with respect to FirstBank.

FirstBank securities were the subject specifically of the claim filed by Weil Gotshal on behalf of LBSF in the LBI bankruptcy in January 2009, and that's after reaching out to Barclays. So I think the evidence is clear it was not an asset of LBI.

THE COURT: With respect to the argument you're making, I'll simply note that experience has shown me that just because a claim is filed in a certain way proves nothing. We had $1.2 trillion of claims filed in the LBHI Chapter 11 cases, many of them have been disallowed and expunged as a result of a process of omnibus claim objections. And in the LBI case, many of the claims made have been the subject of adverse determinations made by the trustee.

So the mere fact that a particular claim is made as of a bar date proves nothing.

MR. MITCHELL: I think there's a little more than that, Your Honor, is I think along this --

THE COURT: I'm simply giving you my --

MR. MITCHELL: I understand.

THE COURT: -- color on what you just said.

MR. MITCHELL: You know, I appreciate that. What I think, though, is you have to read all these communications. It's not as if this is simply Weil Gotshal filing a claim without inquiry.

What we've uncovered during discovery in this case, it's evidence in the case, we're here on motions for summary judgment. We think it's clear that this evidence establishes that we're entitled to this property back.

I think what this evidence, at a minimum establishes, is that there would be a question of fact as to the import of these communications. What they would mean and whether, in fact, this was an asset of the estate.

We think the documents are crystal clear, because it's not just -- we know that as of the time the Court conducted the sale hearing, there was nothing, nothing at all to put FirstBank on any kind of notice, inquiry or otherwise, that its collateral was anything other than collateral, because LBSF was not in bankruptcy at the time.

So this was the LBI bankruptcy. There was no reason for FirstBank to have had any concern. Subsequent to that, FirstBank does -- no reason to believe there's a problem, and FirstBank goes to the counsel for the parties, the Lehman parties, the trustee, Weil Gotshal, and the net

result of that is, nine months of negotiation with LBSF to get the return of its collateral, to come up with close-out figures and get its collateral back. That's not consistent with, it's on Schedule A, we purchased the asset, it's gone.

That's what Cleary -- that's what Barclays is claiming in this case. It's so abundantly clear that this was a purchased asset, and everyone knew it. Well, if everyone would know it, why didn't everyone know it at that point?

We have people -- we have, not just reaching out to counsel for Lehman, but then reaching across to Barclays itself by former employees of Lehman, who are doing this investigation. And they say, we hold your collateral. You know, we dispute what the word we means, but we hold your collateral. They're calling it collateral. That's communicated back to FirstBank. And FirstBank relies on that.

So, you know, with the benefit of four years to think about it, come up with arguments, and be in front of Your Honor here in 2013, arguing the case, if we go back in time to 2008 without the benefit of any of this, FirstBank is told the opposite of notice. FirstBank is told your collateral is here, we're negotiating to give it back to you.

So when they ultimately don't get it back, it's

certainly a reasonable response to say, how did that happen. And the facts of this case support a conclusion that this was never treated as an asset of LBI. There are other reasons, we can go through that.

I'd like to talk about the purchased asset component, and maybe come back to this if I could for a minute.

THE COURT: Okay.

MR. MITCHELL: Because if we talk about the purchased asset component, this may not be the most important part of the case. It's an important part, but it may not be the driving part of the case. Because I don't think this was a purchased asset either. But there are -- there's undisputed evidence in the record that this was never treated as a sale by LBI. And Barclays would have this Court believe that a repo is akin to an outright, no holes barred, sale of assets. It's not.

A repo is a two-part contract. It's a sale with an obligation to return. Other than the Bevill Bresler case, the cases are legioned, where it's the economic substance and reality of the repo that governs. Repos were treated here, undisputed evidence, as a secured loan by LBI. Why? It's obvious why. Because LBSF didn't own the collateral. So LBI couldn't take the collateral in on its books and records as its own asset, that would be stealing.

So what it did is it used it. It borrowed the collateral and knew it had to give it back. That's what this repo was in effect, but it did it to itself, because it was already custodian.

Now Barclays says, well, they weren't custodian, they weren't appointed custodian. That's not true. We have the securities account control agreement, which is Cohen Exhibit 3. The exhibit to Cohen Exhibit 3 specifically lists FirstBank as a party that they're holding collateral for. It gives FirstBank an account number. Then we have in the claim filed by Weil Gotshal in the LBI bankruptcy on behalf of LBS an amendment to that agreement which does the same thing.

So basically what this Court would be saying, if the Court would say that the use of the FirstBank collateral before September 15th, 2008 by open repo, that that is an outright sale by LBSF to LBI sufficient to deprive FirstBank of its property rights of its own property, when that outright sale on top of it was executed by the custodian by its own employees on both sides, and then never treated that way by LBSF's own employees or own counsel, subsequent to that, that's just the evidence. I'm not making the evidence up, that's what the undisputed evidence is.

And while I agree we think the evidence is the same, I think that's compelling evidence, that this was

never an asset of LBI. Certainly never an asset free and clear.

Barclays concedes as well, repos are two part. You have a repo and a reverse. It's not just a repo. The evidence undisputed, their own witness, that the assets were reflected on LBI's books and records with an RR designation. They were not reflected as free and clear.

They were held in something called a custodial account. Barclays says that doesn't mean anything, that's only a title to the account, but that's what it was called.

So this is not something that was, as they would argue to you, LBSF sold the collateral. They didn't. They repo'd the collateral -- they didn't repo the collateral, LBI employees executed a repo of the collateral, presumably to use it in some fashion when they had the right to do that. That terminated. And subsequent to that, there's no consideration, there's nothing whatsoever in this record to establish that that repo still existed after the 15th.

THE COURT: Well, you said presumably to use it in some fashion. My understanding of the factor in which it was used, is that it was packaged with other CUSIPs and became part of the financing via by the New York Fed for the operations of LBI during Lehman week. And that Barclays then stepped into the shoes of the New York Fed, and had all of the rights that the New York Fed with respect to that

collateral. Isn't that correct?

MR. MITCHELL: I would say, no, Your Honor. I don't think parties can deem the property of somebody else to belong to them. And I think what that would purport to do, and there's cases on that. I think we cited an IBM case, with respect to assets of an estate. Strangers can deem all they want, but deeming doesn't make it so. Either it's an asset of the estate, or it's not an asset of the estate. And any use made of the collateral prior to the ultimate disposition and a liquidation would be different anyway. Because that doesn't mean that it can't be put back at LSF.

So -- and that's one of the things the expert testified. There is no concept under ISDAs that you can use somebody's collateral and steal it. There is the countervailing, the right to use provision is counterbalanced by the obligation to return provision.

So, you know, these are pledge agreements. Many pledge agreements are written in absolutes, as the Court I'm sure knows. And then when there's a default, the absolutes become more absolute. But here, there was no default, and in this particular circumstance, there is no right to use -- the expert testimony is, there is no right to use collateral in the secured party's own liquidation. That's beyond thought. It's beyond anybody's writing. It's never

happened before, and if it's justified in this case, it will be the first time it's ever happened.

And, you know, we've spent four years in this case, if there was a case where it happened before, I'm sure it would've been brought to the attention of Your Honor. This is the first time something like this has ever happened.

THE COURT: Well, I don't know if this is the first time that it's ever happened, or simply the first time that it's gotten to the level of argument on a motion for summary judgment.

MR. MITCHELL: That's fair.

THE COURT: But in the context of the Lehman insolvency, it's my understanding that a great deal of confusion occurred prior to and immediately following the bankruptcy, that every counterparty pretty much in every part of the planet, had an actual reason to be concerned as to their collateral, regardless of whether their Lehman affiliate had filed for bankruptcy on September 15 as of September 15. And took appropriate action to protect themselves immediately, including early termination of virtually every derivative transaction that existed, regardless of the counterparty, and regardless of whether that counterparty was or was not in bankruptcy at the time.

So I don't know if this is the only example. I, in fact, expect quite to the contrary. There are countless

examples of institutions in the very same position as your client, that when scurrying about trying to locate their "collateral", and I find the fact that you received some communications via email or other sources of communication that provided missed ques as to the actual location of the collateral as being largely irrelevant.

The question is, was there or was there not a right to sell.

MR. MITCHELL: Well, I think it's -- again, we're jumping, not to quibble with the Court, but I mean, the you received, it's Clifford Chance, counsel for FirstBank, hardly an insubstantial practitioner in this court, and they were in communication with the trustee, with the trustee's counsel, with you know, Weil Gotshal, and you know, I can't speak for why they chose to do what they did when they did it, but they certainly were speaking to the right people, and they were receiving the appropriate assurances and the paper trail of the record is, that that is, in fact, the assurances they received.

THE COURT: Are you saying that incorrect assurances trump the facts? I don't think they do.

MR. MITCHELL: No, I think that we have admissions. I think that there are matters of evidence here, and admissions of a party opponent, certainly it can't overcome the summary -- on a summary judgment motion, where you have

an admission, your own employees responding to an inquiry, that's an appropriate inquiry, and that response is an inquiry right or wrong, I mean, let's assume it's wrong, but I don't know that it's wrong. I don't think it's wrong under the circumstances, but they make a response. The simple response was, and these are Barclays' employees, the simple response is, we bought it, it's on Schedule A. That's all they had to say. They didn't say that. They never said that. And that's not what was told to Weil Gotshal. And that's not what Weil Gotshal -- if Weil Gotshal had been told that, is there any doubt Weil Gotshal would not have filed a claim for return of the securities in January? That was a simple response.

By the end of October, early November 2008, if that's the fact, then somebody should say that's the fact. Counsel says, it was no longer, certainly Schedule A was completed. They didn't rely on Schedule A at the time of the sale order, because it didn't exist yet. And the evidence that we adduced during discovery is Schedule A is as much an inventory of what they received as it is, you know, a statement of what it is they thought they were buying. But certainly by the end of -- they helped prepare it. By the end -- these are the people that helped prepare it.

So by the end of October, beginning of November

2008 when you are asked, where is FirstBank's -- I represent FirstBank, I'm looking for my client's collateral. That's the communication they get. That is transmitted to Barclays. Former employees of Lehman, now working for Barclays respond to those inquiries, that results in not only communication to us, but the LBSF, but LBSF filing claim in the LBI bankruptcy for the return of our securities.

If the answer to that question was they're on Schedule A, and we own them, and it's a purchased asset, then that should've been the response. But instead, it set in motion a series of other events. And I believe, and I submit to the Court that's what happened is, subsequent to the those events, during the course of discovery, it -- other facts have now come to light that Barclays is trying to now change history and go back to the beginning and say, those things never happened. They didn't believe they bought it. They didn't think it was a purchased asset.

Let me walk through the purchase -- let's walk through the clarification letter for a second. I think it may help clarify some of this if I can. Because I'd like to walk the Court through it.

Reading Barclays' reply papers, I was taken by this, we got a representation that they owned all the purchased assets. And, you know, purchased assets,

purchased assets, purchased assets, capital P, capital A. And if you think about it, there's really a circular reference. Because if it's not a purchased asset, then you didn't get a representation that LBI owned it.

So I went back to the clarification letter because we've obviously argued to the Court in our papers that it's not a purchased asset for a variety of reasons.

So if I could, Your Honor, Cohen Exhibit 12 is the clarification letter. I'd just like to walk you through that, because there's some interesting things in here. And --

THE COURT: Do you have copies of the exhibits or do I need to look for this myself?

MR. MITCHELL: Do you have an extra copy?

(Pause)

MR. MITCHELL: I have a copy here.

THE COURT: I have it, it's okay.

MR. MITCHELL: Thank you, Your Honor.

THE COURT: It's just -- it's a terribly thick binder, that's all.

MR. MITCHELL: I understand. Obviously, it's an important document.

Now, the structure of the clarification letter struck me. Because I think it's -- I don't know that anybody's ever really quite studied it because, you know --

THE COURT: Believe me --

MR. MITCHELL: -- I don't think we've ever quite had a case like this.

THE COURT: Believe me, people have studied the clarification letter.

MR. MITCHELL: Okay. Well, I didn't -- I haven't seen anybody quite pick up on this, so maybe I'm wrong, but I will go through it.

The subparagraph A is like the lead paragraph in paragraph 1, purchased assets. That is the only paragraph in the entire clarification letter that describes purchased assets. And, in fact, it's only A that's purchased assets. After A, you move down to other things, including excluded assets and others. So really, it's really 1A is what the purchased assets are.

Your Honor cited to that clause in the Evergreen Solar case, you called it the broker dealer business. But what they call it here is the capital B, Business. And the "Business" is defined in the asset purchase agreement, and it's limited to what you call the North American broker dealer business, and I think it's stipulated that the derivatives business of LBSF was not that. They did not acquire the business that was the business that LBSF did with Barclays. I don't think there's any dispute of that in this case. They don't argue that it was part of the

business.

Now --

THE COURT: You said the business that LBSF did with Barclays. Is that what you meant to say?

MR. MITCHELL: I'm sorry, LBSF did with FirstBank, the swaps agreements and ISDAs. That's not the business they acquired.

Now, it becomes more clear as you go through. Now, the provision that Barclays relies upon to claim title to the FirstBank securities is little (ii) in the hole under A, the securities -- and it is the clause that says, "The securities owned by LBI and transferred to purchaser or its affiliates under the Barclays' repurchase agreement as defined below, as specified on Schedule A."

Barclays reads that provision as an absolute provision, 100 percent absolute. Except that's not the way the agreement is drafted. That agreement is a subparagraph of A. So you can't read out of that clause the necessity that the assets being necessary, be used primarily in the business or necessary for the operation of the business. And because it says the word -- because it said "shall include." See, it ends with "shall include."

And then 1 through 5, that follow, the little 1 through 5 that follow as a structure are subordinate to A. So you don't lose the idea that the assets have to be used

in the business or be necessary for the operation of the business. And the business does not include the business that FirstBank was doing with LBSF.

So even if LBI, even if the Court believes, or the Court would conclude that the communications to FirstBank that it was still collateral was a mistake, that it really was owned by LBI, that's not the end. Because this clause says, even if it's on Schedule A, and even if it is owned by LBI, they don't necessarily get it. Because they didn't buy everything. But that's not all.

If you then go to C, 1(c) on page 2 of the clarification letter, we then start to talk about excluded assets. So let's say we're not so clear on what purchased assets are, and this is the clarification letter, right. So this is supposed to clarify things.

In the middle of the paragraph on excluded assets, it says, "Excluded assets shall not include any and all property of any customer or maintained by or on behalf of LBI to secure the obligations of any customers, whose accounts are being transferred to purchaser's part of the --" capital B, "Business."

Well, that means that if you're taking the account, then you take the collateral. And as Your Honor, in the 60 -- in your own 60(b) decision wrote, in connection with the dispute between Lehman and Barclays, your assumption as well

as Judge Forest's assumption when she looked at the publicly traded derivatives, is that if collateral transferred, pursuant to this clause, then collateral transferred as collateral. That was the assumption. Plain as day.

So now we have 1(a), has to be part of the business, and not just the fact that it's on Schedule A and owned by LBI is not enough, because they didn't buy everything. And now if that wasn't clear, here we have excluded asset as any collateral that they don't take the account of. And they didn't take ours. But that may not be enough, right.

So let's go to paragraph 21. And paragraph 21 says, as if the first two aren't clear enough, "Definition of excluded contract. As used in the agreement, the term excluded contract shall include any ISDA master agreement, and any master swap agreement, and any schedule thereto or supplemented or amended thereto."

So they didn't take our contract for sure. They stipulate to that fact. And our collateral was posted pursuant to an annex to an ISDA master agreement.

So where are we here in terms of the claim that this was a purchased asset, a fairly thin read. And not just a fairly thin read, inconsistent with what appears to be the plain language of the clarification letter, in terms of what was purchased, what was excluded, and separately

inconsistent with what I say are evidentiary admissions after the fact by Barclays' own people that they didn't buy it.

The fact that Barclays during discovery learned about the existence, we don't know by the way that they weren't closed, but they learned about the existence of repos that occurred before the collateral use cut-off date doesn't mean that it was still collateral -- that it was still open repo at that time, a) doesn't mean that. But separately, it's inconsistent with their own recitation of the facts. They didn't purchase it. If it’s not a purchased asset, then the sale order doesn't cover it.

If that reading, and I dare say, that's fairly straight forward contract interpretation. There's no question in A, that little 1 through 5 in the hole are subordinate to A. So A still applies.

Now, when we add to this that we reach out to Weil Gotshal, who we understand was the primary draftsman of the document, it's clear when Weil Gotshal files a claim on behalf of LBSF in the LBI bankruptcy looking for a return of the FirstBank collateral, Weil Gotshal didn't believe that this was a purchased asset, or that Barclays had acquired it.

So I think the Schedule A and the on Schedule A is a bit of a red herring, because it doesn't make it a

purchased asset.

We also made an argument in the papers that was never responded to, which is, Your Honor said, and I agree with Your Honor, there are things that come to light, don't come to light, because it never is the subject of litigation. But the testimony in the case was that Barclays -- Lehman was always using collateral. I mean, they use -- you know, like you go to a bank, they don't keep your -- you know, your money in a safe deposit box. Banks use assets that are deposited with them, that's standard practice in the industry.

But there was -- there's nothing here to establish that the use of the collateral being made at that time continued subsequent to the 15th, because the evidence doesn't show that it did. It never continued from that point.

So if we accept the fact that A controls, as a matter of contract interpretation, and that all the -- and I believe there are many decisions on this, Your Honor. I believe that Your Honor has said in a multitude of decisions that you've described it as the North American business of Lehman. I mean, there's been a general description of what that business is that was being acquired. So there's been -- and I think the Evergreen Solar case, as I read it, I think the assumption that Your Honor was making in that,

that the assets in that were part of that.

But what happens where the assets are on Schedule A, but are not used in the business? The clarification -- I don't think that issue has ever been addressed by Your Honor in any decision, number one. And the plain language of the clarification letter is, that it needs to have both components of that.

We argued in our papers that what happened in circumstances where the account was taken. Since collateral was always in use, it's fair to assume that other collateral was used by Lehman on the Fed repo, and the Barclays' repurchase agreement, but that Barclays otherwise acquired the customer account.

I didn't see any case in which Barclays has ever claimed that if we assumed the account, and we argue this in our papers, where you assumed the account, that the counterparty or customer has to post new collateral because we own your collateral because it was being used. It wasn't interpreted that way.

If they assumed the account, if they assumed the contract, then whatever was posted as collateral continued to be collateral. Why should it be then if you don't assume the account, and if you don't assume the contract, that you get to keep it because it was used in the Fed repo, or it's used in the Barclays' repo? That's not consistent.

Now, there has been no analysis or discussion by Barclays of that portion, and I dare say if you read the papers submitted by Barclays, there are a lot of generalities. It's a stack of a lot of general statements of law in a one off case. But you don't see any discussion of used in the business. They're not arguing they're using it in business. They admit they did not, they admit they did not take our contract, yet they keep our collateral because of now, what is this thin read, never spoken, never discussed until now, of the existence supposedly of these repo continued after the 15th, which there's no evidence of continuing even when it touches them.

Now, among the other things, Mr. Morag handed me some papers I guess that he proposed in his argument to share with Your Honor, one of them being some of those emails to walk you through. He doesn't include in his exhibit the final response that Weil Gotshal made to FirstBank, interestingly, leaves that one out. He only gives you the behind the scenes communications between Weil Gotshal. I didn't look to see if it was Hughes Hubbard, too, but there was also Hughes Hubbard, but the communications back and forth with Barclays. He leaves out Cohen Exhibit 22, which is what we were told.

And he certainly doesn't mention -- he certainly leaves out the claim that the trustee filed in the LBI

bankruptcy to get our collateral back. He also mentions in one of the list of documents he proposes to show you that Schedule A was filed on September 29th, 2008 under seal.

At the time, I -- whether Your Honor -- I assume in the fog of the day, people thinking that my collateral was with LBSF and LBI's filing for bankruptcy that that's not -- and LBSF is not in bankruptcy, I guess if the Court -- you know, the Court would have to presume that somebody would have to do more. But at the time of the filing of the -- of Schedule A, it was filed under seal, and FirstBank was not on any notice that its collateral was anything other than collateral.

In fact, the public -- assuming it even saw, and maybe it did, I don't know, but assuming it saw the clarification letter, the only conclusion you could draw from the clarification letter, is that ISDAs were not included under paragraph 21. So there was nothing in the public record to put FirstBank on any notice, inquiry or otherwise, that its collateral was in any way, shape, or form at risk, and that it was anything other than collateral. And the proposition obviously generally is, collateral does not belong to the debtor, it belongs to the party that posts it.

And we jumped ahead, just a couple of points here with respect to the idea of collateral. If you -- if the

Court accepts the fact that as a matter of evidence in the case, there's an admission from the expert presented by Barclays that even though there was a repo from LBSF to LBI of the FirstBank collateral, unbeknownst to LBI, that did not change FirstBank's interest or right to claim ownership of that collateral. They still appropriately reflected it on their books and records despite the repo.

Now, that's -- if you have that fact, it's an undisputed fact, if that fact is out there, you can't on the other side then say it belonged to LBI exclusively. Which it did not.

THE COURT: Let's break in for a second with a question about the nature of this collateral. My understanding is that this was book entry mortgage backed security collateral identified by CUSIP numbers. That the CUSIP numbers in question were actually on Schedule A.

And that inquiry by your client as to Schedule A would have led to the conclusion earlier on, that in fact, the collateral was there. But let's move past that.

The collateral itself is meaningless. We're not talking about a Rembrandt. We're not talking about unique collateral. We're talking about something that's measured in mark-to-market dollars. Under those circumstances, where the collateral is is meaningless. What you have is a claim against LBS. No claim was made as I understand it against

LBS. I can't understand how that could have happened.

As far as I can tell, we're in this litigation as a workaround for failure to pursue remedies that were available in the bankruptcy. Can you comment on that?

MR. MITCHELL: Well, that's the argument that Barclays makes, so obviously if the Court is addressing it in that fashion, then I assume the Court is adopting Barclays' interpretation of facts.

THE COURT: I'm simply asking you to respond what I've just said. It's not the interpretation of the facts, it's a question arising out of your constant use of the term collateral, with the notion it has secondary meaning.

MR. MITCHELL: Okay.

THE COURT: And that ownership has meaning in the context of default under an ISDA agreement. I'd like you to comment on that as well.

MR. MITCHELL: Okay. FirstBank was represented by Clifford Chance, competent counsel. The -- as a general proposition, without getting into attorney/client privileged information because I think you're treading upon areas, if I would explain to you the entirety of the analysis that went into why it was done the way it was done, that would be an evasion of the attorney/client privilege.

As a general proposition, I would say to you that if, in fact, this was collateral, then it's not an unsecured

claim against LBSF. It's property owned by FirstBank, and an unsecured claim against LBSF would be inappropriate.

So if you -- if this is collateral, which we -- which the documents absolutely 100 percent, at some point it was collateral, even Barclays concedes that, if it was collateral, then an unsecured claim in the LBSF bankruptcy was inappropriate. Because FirstBank was not an unsecured creditor in the LBSF bankruptcy. It was owner and trying to retrieve its own property.

If I go beyond that, I think I would be treading on attorney/client privilege, but I think as a general --

THE COURT: But this is a financial transaction. This isn't a replevin action. We're not seeking to recover an artifact. It's all about accommodating the parties to a swap agreement that was in place for a very long time. And the pursing of "collateral" is simply an accommodation to moderate risk for one party or the other.

MR. MITCHELL: It's not an accommodation.

THE COURT: So part of what I'm having some trouble with here in your argument, is that your argument seems to be predicated upon a fairly antiquated notion of identifiable property, when in fact, this is little more than a claim not properly perfected against LBSF as debtor.

MR. MITCHELL: Well, Your Honor, in looking at the Evergreen Solar decision --

THE COURT: I think that's an important decision to look at too.

MR. MITCHELL: Right. One of the things that was not cited in Evergreen Solar was the case of Fire Off against Nationwide Mutual Insurance Company, and I presume nobody brought that to the Court's attention. It was a 2007 Court of Appeals decision. It was on -- it was referred to the Court of Appeals by the Second Circuit on a question concerning collateral. This is a quote from the case, from the Court of Appeals.

So I'm not -- you know, we're on the diversity case applying state law in federal court, and the notions of conversion under state law are what apply. And this is the Court of Appeals. This is a Court of Appeals decision responding to the Second Circuit. This is a quote on page 292 of the decision, which is 8 New York 3rd 283.

"The merger rule reflected the concept that intangible property interests could be converted only by exercising dominion over the paper document that represented that interest," citing a case. "Now, however, it is customary that stock ownership exclusively exists in electronic format. Because shares of stock can be transferred by mere computer entries, a thief can use a computer to access a person's financial accounts, and transfer the shares to an account controlled by the thief.

"Similarly, electronic documents and records stored in a computer can also be converted by simply pressing the delete button." Citing a case. "It would be a curious jurisprudence that turned on the existence of a paper document rather than an electronic one. Torching a company's file room would then be conversion, while hacking into its main frame and deleting its data would not." Emphasis omitted.

I think if there's any -- I don't think there's any doubt under New York law that after the Fire Off case, these electronic data entries of CUSIPs can be converted, and that was among the issues addressed by the Court of Appeals.

I don't know that anybody cited that case to Your Honor at the time of the Evergreen Solar decision. I think the Evergreen Solar decision is also distinguishable, because the different between Evergreen Solar and our case is, is there any question that our collateral has been specifically identified over and over again on document after document. We provide a -- first, we provide the CUSIPs, we get reported the CUSIPs. The CUSIPs are in the claim that LBI filed -- LBSF filed in the LBI bankruptcy.

Mr. Morag traced the use of each piece of collateral back to inception, in and out, in and out in his October 20th, 2011 letter.

THE COURT: There's no dispute the CUSIPs are

absolutely critical to the analysis, and CUSIPs have been an absolutely critical element throughout the Lehman Brothers' bankruptcy cases. Nor is there any issue with respect to the case that you cite, which I read in your papers, as to whether or not electronic data is equivalent to paper data for purposes of certain aspects of the law. But none of that matters here.

The issue is whether or not the property in question properly was hypothecated to LBI, properly used by LBI, and actually acquired under the sale order by Barclays. So, in a sense, while I'm certainly paying attention to everything you're arguing to me, the central thesis of your argument is this property was never LBI's to sell, was never actually covered by the sale order, and was actually not Barclays to purchase, even though it was on Schedule A because it was identified collateral under the credit support agreement or annex associated with your ISDA.

I believe that to be your central argument.

MR. MITCHELL: That's the second argument. That's not the central argument. The central argument is under paragraph 1 of the clarification letter. Whether or not it was owned by LBI, it was not a purchased asset at all.

THE COURT: Well, but --

MR. MITCHELL: Because it wasn't used in the business.

THE COURT: But you're kind of reading out --

MR. MITCHELL: It's excluded.

THE COURT: It's a particular way that you're reading a document that says "purchased assets shall include:" and you're suggesting that that shall language is necessarily modified by the, when necessary for the operation of the business, or used primarily in the business. Which is simply one way of reading imperfectly drafted language.

MR. MITCHELL: Well then, I would say, Your Honor, if Your Honor is -- if Your Honor at least -- I think the structure of the paragraph is clear; however, at a minimum, it's not clear what Barclays is saying.

THE COURT: There isn't much that in life that's really clear. So especially when parties have been involved in good faith litigation for years, where the facts are largely stipulated, but the legal conclusions are diametrically opposite. It's not that helpful for me to say that something is clear, when the reality is that there's a good faith dispute as to what the right answer is.

MR. MITCHELL: I agree with Your Honor on that. So what I would say to you is that either the Court can say the contract is unambiguous, in which event the parole evidence is irrelevant, it just says what it says. Or we allow for -- and by the way, we're a stranger to this contract.

So whether or not we've been barred from presenting parole evidence because it's not our contract, is also another question under New York law. But put that aside. If it's not so clear, and I think the drafting of this, the drafters, these are very smart people, I mean, they did create subparagraphs here. The --

THE COURT: A lot of --

MR. MITCHELL: Unclear would be then we'd turn to some parole evidence.

THE COURT: We can stipulate that a lot of really, really, really smart people worked really, really, really hard under extraordinary time pressure to deal with one of the most complicated transactions that has ever been devised in the history of modern finance, and was closed in Nano seconds in relative terms.

And so there is no one author of this document. The evidence is fairly clear to me that this was -- on the part of a committee, and it was done in a hurry, and there were lots of people, including some partners at Cleary Gottlieb who took part in the drafting of this document.

So we look at it as the manifestation of intent at the time. And it's my job to construe it, and it's your job to argue what it means.

MR. MITCHELL: I understand. And I think, Your Honor, that intent can be shown by the conduct of the

parties after the fact. And what I would say to you, in response to your question that nothing is clear, closest in time to the crafting of that document is that email exchange, and the filing of the claim in the LBSF -- in the LBI bankruptcy, that would indicate that principals to this agreement did not interpret this agreement to be transferring the FirstBank property, the FirstBank collateral to Barclays. That's in October, November 2008, January 2009.

These are parties that were -- they're part of that group of people who did their best to come up with something, and certainly they, who had possession of Schedule A, they had -- they certainly had Schedule A, they helped prepare it. They didn't take the position that the FirstBank collateral was a purchased asset.

Whether that was because it's not a purchased asset under 1(a), or because it wasn't owned by LBI, I don't know. We don't need to know. What we need to know is, that that was the position they took. So that should help the Court in interpreting what was intended by the parties, by this language that is included in here. And I have offered the Court an interpretation of why it would be that it would be interpreted that way. It's a fair interpretation.

I know Your Honor, you know, we're looking at a massive transaction that closed in a matter of days, the

Court was under tremendous pressure, I appreciate all that, I'm not arguing anything differently. What I'm saying to you is, I'm standing here on behalf of the FirstBank of Puerto Rico. FirstBank of Puerto Rico had $62 million as collateral, always reported to it as collateral, that ended up in the hands of Barclays.

If you look at that from 60,000 feet, now whether or not Your Honor can say it's the right thing that should've happened under the circumstances is a different story. But under the facts of this case, every piece of paper that existed at the time, put it on absolutely no notice that its collateral was even at risk, that it was the subject of anything. In fact, the communications were to the contrary.

And lo and behold, we are in a world where their ISDA was not accepted, they didn't assume the ISDA at Barclays, but they keep $62 million of their collateral as a purchased asset, and it's not even the business unit they purchased.

I -- you know, from a matter of -- and I know the law doesn't turn on fairness, but FirstBank had no ability to protect itself. Maybe -- and if we had even -- not saying that we had notice or we could have had notice, but FirstBank's $62 million question in that one week of what was going on, when LBSF wasn't even in bankruptcy, would not

have had a second's notice, because there were bigger things the Court was dealing with.

So when the dust settled, and it certainly had settled by the time FirstBank says where's my property, when the dust settled, an inquiry is made to Barclays, where is my property, or where is the property. If it was on Schedule A at that point, don't we have enough good lawyers and smart lawyers working on this that they would've known it by then? Because the dust had settled a bit.

We allege in the complaint at the time, we didn't know all the facts of the case. We alleged in the complaint, is it unreasonable to have assumed that a transaction of this magnitude done on such short notice, resulted in a massive dump of assets on Barclays that needed to be sorted through. Some things could have come over by mistake, even Barclays' own expert admits mistakes happen. Things could end up where they don't belong.

But as you start to sort through things, and you start to put things into your computer systems, and you start to determine what belongs where, do we own it or do we not own it. By November, shouldn't you at least know if you bought something and it's on Schedule A? How hard is that? I mean 8,000 CUSIPs, so it's 8,000 CUSIPs, I mean, how many transactions does Barclays do everyday? They keep track of more than 8,000 CUSIPs. That was on the computer system in

a matter of hours, I'm sure. It was an electronic transfer.

So, you know, we aren't really talking about something that's like this innocent little mistake. I don't -- the evidence is, on a summary judgment motion, the evidence is that after having this material, they didn't think it was a purchased asset, and nor did LBSF. If it's so clear it's a purchased asset, why isn't somebody saying it?

So, Your Honor, I agree with Your Honor, you know, and I've read the decisions. You know, I'm sure you were under -- I'm sure Your Honor was under incredible pressure that week, you know, a week like any other.

THE COURT: This is truly not about me.

MR. MITCHELL: I understand that but --

THE COURT: So whatever pressure I was under has zero to do with the issues before me today.

MR. MITCHELL: Well, I hear from the question of Your Honor, and I'm just trying to address the notion that everybody did their best.

THE COURT: No, I'm not saying that at all. I'm responding in part to your assertion in effect using Weil Gotshal as a catch all for what the debtor knew or what certain parties knew at various times either leading up to or following the drafting of the clarification letter.

It's fairly clear to me that the clarification

letter was the work of a committee, that a number of parties had a role in drafting it. And it's also clear to me, and again, this has zero to do with anything that I did during Lehman week or thereafter, that parties were engaged in efforts to reconcile accounts. And that that was a massive undertaking, having to do with transferred accounts to Barclays, but also tens of thousands of derivative counterparties, of which your client is but one.

And so in that setting, the fact that there is imprecision with respect to certain CUSIPs that you care about, doesn't necessarily prove very much.

MR. MITCHELL: Well, Your Honor, on a summary judgment motion, I would say that at a minimum, it was raise questions of fact as to who knew what and when, and whether and to what extent those documents do constitute admissions, and clearly the people who were preparing and drafting and writing those documents were former Lehman employees, there's no question about that, they were employed by Barclays. It's not just Weil.

I'm only using Weil as the spokesperson, but it was Weil, it was Hughes Hubbard, it was Barclays. Because it was the group that responded ultimately by January on what should happen. And that's the record. I'm not making the record up, that's the record we've established in the case, that's the record before the Court on the motion for summary

judgment.

And I would say to the Court that even if the Court finds that there's imprecision, or if the Court finds there's imprecision in the clarification letter in connection with the drafting of the purchased assets provision, that those documents are -- you know, they're not documents that you could ignore on a motion for summary judgment. Certainly you can't grant summary judgment to Barclays in light of those documents crafted by its own people, it would raise a question of fact that would have to await trial for a solution.

THE COURT: But how --

MR. MITCHELL: For a trier of fact to determine the weight to be given.

THE COURT: How do you reconcile the fact that, at least as I understand it, Schedule A includes the CUSIPs in question. How do you reconcile Schedule A with inconsistent statements that are simply wrong?

MR. MITCHELL: Your Honor has pointed out, and we agree that -- well, I would say to you that the time to use FirstBank's collateral terminated, we all agree, on February 15th. A use of our collateral is different than a sale and liquidation.

So the prior use -- the fact that our collateral was used on something is not necessarily and certainly

before the bankruptcy, not necessarily inappropriate. But what we have here is, the way this deal was structured, it was structured as a purchase. The Barclays' repurchase agreement was terminated, the termination letter with respect to the Barclays' agreement was terminated, and we ended with an out right asset sale, that that's what the Court ultimately blesses.

And that's when I said to Your Honor, you can't deem something to be the property of yourself, when it's not yours, because the bankruptcy court doesn't have jurisdiction over assets that are not assets of the debtor.

So the fact that Barclays and Lehman purported to deem everything on Schedule A because it -- which didn't exist at the time anyway, but we're going to deem everything on Schedule A belongs to Barclays. That doesn't bind a stranger. And it doesn’t put the asset in front of Your Honor.

So whether you use the asset in some other fashion in a financing transaction at an earlier date, does not authorize the disposition of that asset permanently and forever in a liquidation transaction. That's also one of the things that our expert testified.

I know Your Honor's given me some time. I just want -- a couple of things. I just want to talk to you just briefly about the repo and why these repos, the LBSF, the

LBI repo is not or should not be treated in this case as a sale.

First, I already said to Your Honor, repos and reverses go together. Similar to accounts in collateral like you talked about in the 60(b) decision, like Judge Forest talked about in the 60(b) decision. So it's not the reverse. The repo and reverse are collective and they're maintained that way on LBI's books and records.

This is -- these are undisputed facts in the record of this case. LBI treated the repos with LBSF as secured loans, not as a sale. LBI never showed the FirstBank collateral on its own books and records as its own asset.

Barclays' expert admitted had FirstBank properly continued to list the FirstBank collateral as its own asset, after the repos. LBI's own books and records reflected that it did not own the FirstBank collateral out right. It used an RR designation to reflect its duty to return it.

LBI was already custodian for the FirstBank collateral, pursuant to a separate securities account control agreement, and was therefore bound as LBSF's agent, by whatever LBSF's obligations were to FirstBank. Obviously LBSF's right to use the collateral terminated on September 15th, and LBSF filed a claim in January to get it back. Those are all facts inconsistent with full complete absolute ownership of the FirstBank collateral by LBI.

The Bankruptcy Code also has a safe harbor for repos. Repos are not subject to the bankruptcy stay. They can be closed despite a bankruptcy filing. So even the Bankruptcy Code envisions that repos are not full absolute and unconditional transfers of title to a debtor.

The only thing there really is --

THE COURT: I'm not sure what you just said is a fair conclusion to be drawn from the existence of the safe harbors in the Bankruptcy Code, but I'm just going to let it go by.

MR. MITCHELL: Well, Your Honor, I think it's fair to say that if there is an attempt to close a repo transaction -- if there's anything with respect to a repo transaction after a bankruptcy filing, it at least comes before the Court, and the Court would address those issues. It's not something that would happen outside of the purview of the bankruptcy court. Here we know LBSF had no employees of its own, no one acting through -- it acted only through the employees of LBI. The person responsible for the LBI -- LBSF side of the collateral was an LBI employee. And he testified that as soon as LBHI filed for bankruptcy, he was told by management do nothing, to not return calls, to take no action.

Certainly there's nothing in any record in the bankruptcy case that I've seen, that anyone brought to your

attention the fact that there were open repos between -- of collateral of counterparties on contracts that were not being assumed by Barclays. That there were open repos of collateral from LBSF to LBI. Shouldn't the Court at least have had an opportunity to decide how this should be resolved, or what this -- you know, what all this meant? Why didn't somebody bring that to your attention? If they couldn't do it right away, why didn't somebody bring it to your attention right away? Hey, we have this problem.

Instead, all this got swept under the rug. In fact, Your Honor even in the 60(b) decision said, you didn't even see the clarification letter, and you never passed upon the clarification letter. So it's not even that the language that they chose in the clarification letter is language that the Court blessed. But isn't it fair to say that something like this, I mean, we're talking about $62 million of what is called collateral at some point, and is identified by CUSIP from an innocent party, disappearing into a $45 billion sale to Barclays, when they clearly and expressly in many places say they're not going to do it. That's not part of what the sale is about.

Briefly so -- and obviously we gave you -- we have in the papers that these repos were not arm's length, and why, I talked about that briefly.

THE COURT: This argument has gone on for quite a

while, and I think it's may be time to highlight any points that you think you need to emphasize, and then we're going to take a short break.

MR. MITCHELL: Okay, Your Honor. Yeah, that's what I was going to do. I was summing at this point, just finding things that I want to -- that I haven't touched upon.

We talked about the LBSF and that we're a stranger to the clarification letter. So binding us by what Barclays and Lehman deem is not appropriate under the law.

I think the 60(b) decisions, both yours and Judge Farr's clearly presume that the only collateral transferred as a purchased asset was that securing publicly traded securities, and that it transfers as collateral. Both of you say that.

There is no mention in any decision, nor do I see from any decision that either you or Judge Farr might have ever been aware of the fact, that there was even the possibility that any collateral was separated from the obligation it secured by some inner affiliate repo that's unknown to the party that posts the collateral, and therefore, loses its collateral, it's character's collateral.

You know, that's something that if there was -- and I daresay the Court -- I can't speak for the Court, but I

don't know that the Court was aware, that there had been circumstances where collateral was supposedly separated from its obligation by a LBSF to LBI repo and that event alone was enough to allow that to go. But I've not seen any decision where that has ever been passed upon.

Also there's stuff in the papers they talk -- we're not challenging the sale order. It's not a 60(b) case. Our position is that the sale order only confirmed the transfer of purchased assets, and these are not purchased assets. So I think that's -- I think the Court understands that's the thrust of our decision.

The only mention of notice in our papers is that you can't take -- obviously it's fundamental due process. You can't take property without notice. I don't think there's any evidence in this record, or we had any notice that our property was even at issue.

The IBM case that we cited to the Court with respect to patents and the transfer of patents in the TM case is one in which that issue is discussed.

In conclusion, I'd say in the records of this case, Your Honor, at a minimum there are questions of fact that require resolution at trial. We think the only party that could be entitled to summary judgment is FirstBank based upon what we think is a clear interpretation of the clarification letter.

But in light of the evidence, close in time, following the execution of the clarification letter, and the entry of the sale order, it's clear that the principals to that document did not consider the FirstBank collateral a purchased asset. And the weight to be given to that evidence would be for a trier of fact if the Court finds there's an ambiguity, and cannot determine from those documents whether that's sufficient to grant summary judgment for FirstBank.

But you can't simply do as Barclays asks and ignore that evidence, because that evidence is in the record, it's undisputed, and it's clear what happened for a period of nine months after the fact, that FirstBank was told, your collateral is at LBI, and LBSF negotiated with FirstBank for return of that collateral, net of whatever the obligations were party-to-party.

Thank you, Your Honor, for the time, and I'm available for reply when we get to that. Thank you.

THE COURT: Okay. Let's take a break returning at a quarter to 4.

(Recessed at 3:34 p.m.; reconvened at 3:48 p.m.)

THE COURT: Be seated, please.

MR. MORAG: Good afternoon, Your Honor, again Boaz Morag of Cleary Gottlieb for Barclays Capital.

I'd like to begin basically by explaining why these

20 positions are purchased assets, and why the sale order disposes of this matter.

The one thing I think that I would want to point out though at the start is that Mr. Mitchell did not address at all our arguments under the UCC and Article 8. As far as I can tell, even if there were an issue with respect to LBI's capacity to convey securities to Barclays, under Article 8 we're protected, and they really have no argument in their papers why that would not apply.

We gave value. I can deal with that in more detail. The -- we took possession, we obtained control, and there's no allegation whatsoever that Barclays had any knowledge of FirstBank or FirstBank's relationship with LBSF or FirstBank's interest in these securities at any time in September of 2008, whatever time you want to think about it.

So that's just something to put out there. But with respect to the sale order, because that is the issue that and the reason that Judge Daniels referred this case to Your Honor, finding it a core matter because it requires construction of the sale order.

The reason that these are purchased assets is very clear. Because by the time the clarification letter was agreed and signed, and presented to this Court, the one thing that the parties negotiating that letter agreed on was that whatever the securities were that came over in the

repo, that had happened three or four days later, those were going to be purchased assets. And that is evident from the fact that that's what the clarification letter specifically says.

And frankly, that's what Your Honor understood it to mean, after having sat through the Rule 60 trial in Evergreen Solar, where you said that the clarification letter specifically provided that the rights and obligations of the parties under the repo, referring to the September 18 Barclays' repo, including LBI's right to repurchase the transferred securities would terminate, and all securities held by Barclays under the repo would be deemed part of the purchased assets.

And I can walk through the specifics in Mr. Mitchell's reading of the language, the word includes and so on, but there are other provisions that make this very clear. And you first -- Your Honor has already outlined in your question, that you have the chronology down pat. That all of the repos to LBI occurred prior to September 15th. That from the date of the repo, whatever it was, onward, LBI used these securities, this is in the record in the letter where we traced back the use of these CUSIPs everyday in the relevant timeframe to finance its business.

It put them out on tri party repo when the financial world was still lending money to LBI, it put it

out to the Fed when the Fed was the lender of last resort to LBI, and for the period of time when the Barclays' repo was open as a repo, Barclays was the one providing financing to LBI, which as Your Honor knows, part of the broker dealer's business is to obtain financing for its operations.

So the first point is that this was used in the business of LBI. The fact that we did not, Barclays did not assume and take over the over the counter derivatives business does not negate the fact that LBI used these securities in its overall business that we did acquire.

Second, the word include is a defined term in the APA. It means without limitation and is not meant to be exclusive.

And third and finally what Mr. Mitchell did not address, was also paragraph 13 of the clarification letter, which Your Honor cited in Evergreen Solar which again is further corroboration effective at closing, all securities and other assets held by purchaser under the September 18, 2008 repurchase arrangement among purchaser and/or its affiliates and LBI, and/or its affiliates and the Bank of New York as collateral agent, shall be deemed to constitute part of the purchased assets in accordance with paragraph 1(a)(2) above.

So -- and as we pointed out, and nothing was said about this, the original argument was that it was an

expressly excluded asset, because of this idea that because we weren't taking the over the counter derivatives business, that meant that these securities were still being -- had this indelible characteristic of collateral for the rest of time.

And we pointed out that in the excluded asset definition in 1(c) on page 2 of the clarification letter, there is an express carve out of the definition of excluded assets for anything obtained in the Barclays' repurchase agreement. This in the middle of the paragraph on page 2, 1(c).

So even if this would be otherwise related to over the counter derivatives, TBA mortgage notes, similar asset backed securities, these securities, everyone knew what they were, they were on a list. Those are not excluded assets, and they are clearly purchased assets, so.

And the one issue that Judge Daniels had at the time of the motion to dismiss was, I can't look at all of these papers outside the pleadings, I just need to know was it the intent of the parties that this be a transferred asset or not. And I think that is made clear by the chronology Your Honor mentioned.

LBI repos them to the Fed. On the 17th of September, they give Barclays the list of the Fed repo collateral, and says, this is what you're going to get. God

willing.

Barclays looks at it, says okay, fine, we'll do the repo. Barclays transmits $45 billion of cash, that's stipulated. It's stipulated that these were with the Fed. They come across in that Fed repo on the 18th of September, they get booked by Barclays, and they get booked with values that there can be no question are appropriate, because indeed that's the valuation that FirstBank relies on for their highest intermediate damage number, whatever that is.

So then they come in on the date they're supposed to come in the transaction where they're supposed to come in, Barclays accepts them, it books them. The clarification letter then confirms the understanding that they will be treated as purchased assets because frankly, that was the one set of securities people could identify. That was the one thing that people knew exactly what it was, and the quantities, and the CUSIPs at that point.

Schedule A is finalized. As Your Honor knows, it's 8,500 CUSIPs, there's also a Schedule B of clearance box assets that has to get finalized. It is presented to the Court under a motion jointly by the debtors and by Barclays saying this is the clarification letter, it's binding on the parties, this is on their understanding, and it includes these schedules of purchased assets that we need to file under seal, for reasons that Your Honor ultimately accepted,

which was the commercial sensitivity of knowing that Barclays may want to sell exactly these positions over the next coming months.

So -- and we're beyond the issue of, you know, the clarification letter. In Evergreen Solar, you put it very succinctly, although it was not formally approved, the Court has determined its unenforceable nonetheless.

So that's really it. These are clearly purchased assets. And let me say why I think we stop there. We stop there because Your Honor made findings in the sale order that LBI had the power to convey these assets. And Your Honor also provided a remedy for parties like FirstBank who claim an interest in the purchased assets.

Indeed, if you think about it, if the only assets that LBI was supposed to be conveying in this transaction, and under Section 363 of the Bankruptcy Code generally, are those assets in which no one in the world could possibly claim another interest, you wouldn't need the remedy that was provided for therein, which was the claim to make against the holder of the proceeds of those purchased assets.

And if as you heard they still take the position that this was never an asset of the estate, of any Lehman estate, it was quote collateral, and that makes it something different, that sounds like it would've been a pretty good

claim on the proceeds. They've never made that claim against LBI or LBHI who are holding those proceeds, and they're jointly and severally liable by the way.

So the point is that that's why -- but the one thing you also did is you enjoined this very lawsuit, which is the subject of a motion for contempt that we're deferring until after Your Honor resolves this motion, but -- so that's the one thing that in light of the principles of Section 363, in light of the findings that Barclays insisted on as part of this transaction, they couldn't do.

You can't -- the title passed free and clear, the order was not stayed, and the entire point is, at that point, the risks of interests coming out of the woodwork on a particular asset is with the party holding the proceeds from that sale.

That is how the sale order and sales like this are supposed to work. It is not as FirstBank suggests, we get to see the assets, have like 30 or 60 days to look at them, check the providence, okay, these are not Picassos or Rembrandts as Your Honor pointed out.

This is against the back drop of Article 8 of the UCC, where specifically you're not required, and you're not supposed to do diligence on your seller's chain of title. Precisely because of the way the markets work, and the decision made by the New York legislature, and every other

legislature who's adopted Article 8 of the UCC, that we do not -- that we have special rules for the sale of transactions and securities.

So this was no situation where we set the assets, look them over, send back some things that we don't like or want, or we have questions about, maybe Lehman sends over something else in exchange. We paid for this, and now they're asking us to pay twice, frankly. I mean, there's no other way around that.

And the other entity that paid for these assets, and I do -- but that is why I think you can stop at the sale order. They've conceded the facts that these were repo'd by LBI to the Fed and returned to LBI on the morning of September 18. That is what made it an asset of LBI, subject and eligible to be included in the sale, subject to whatever interests the world may have in those assets.

THE COURT: Let me ask you a question about the cut off date that everybody has stipulated to of September 15. Does it matter that the CUSIPs in question were transferred in to LBI in connection with the Fed repo, subsequent to that cut off date?

MR. MORAG: No, here's why. The use of that can be made of posted collateral by the secured party, LBSF was very broad. Your Honor has seen the quotation of Section 6(c) of this CSA in every one of the briefs. They could

sell it, rehypothecate it, repo it, do anything, including totally lose control over any possible way of ever getting it back. Precisely because it's a fungible CUSIP that wherever it is, you can go out and find another one exactly like it in the same quantity.

So until February -- I'm sorry, and you did that, too. Until September 15th, LBSF was free to use these CUSIPs and repos, and you heard the concession that those uses were proper.

Now, what -- how does LBI get these CUSIPs. First of all, it's very important because it's important for Your Honor to understand.

You heard highly questionable repos, they didn't buy it, they borrowed it. Okay. Well, let's slow down. These are repurchased transactions under the documentation of the master repurchase agreement, which provided for a cash payment. We have produced and are in the record before you, the confirms for every single one of these repos, which are the same precise confirms that LBI would've used if Goldman Sachs or one of the test case plaintiffs who are coming up and have their own repurchase arrangements with LBI, were repurchasing securities with LBI.

And indeed, if I may, Your Honor, we have just one of the several -- oh, do you already have this?

THE COURT: Do you want to hand that up?

MR. MORAG: And what the repos show is that this was an ordinary course -- I mean, this is the transaction, it's memorialized the same way every other way repo transaction is memorialized as between LBSF and LBI, and as between LBI and other repo counterparties. And you're looking at a confirm for trades that settled on July 8th, and if you turn to page -- it's at the bottom of 16 in the Bates stamp.

Do you see there a transaction blocked in yellow?

THE COURT: What's the production number?

MR. MORAG: 016.

THE COURT: Yes, I see it.

MR. MORAG: Okay. So this is -- this represents all of LBI's repo activity with LBSF. If you look at the first page, which is 13, this is all of the transactions between Lehman Brothers, Inc. and the LBSF collateral repo account. And it turns out that one of these many securities is a FirstBank CUSIP. And there is a repo like this, is Exhibit 40 to my declaration, for every single one of these highly questionable repos.

And this is the amount, the $3,737,000 that LBI paid in cash that day, obviously all of the payments were netted for one payment, but that is the amount in cash that is -- it was credited to LBSF for selling this CUSIP.

And the other point, if you could look at page 28,

which is the last page of the extracted confirm, condition -- terms and condition 10, again, there are standard terms and condition. "As payment shall be made in federal funds on the settlement date."

Okay. And in paragraph 20 at the bottom of that column, the second sentence, "If our capacity was as principal, we bought from or sold to you as dealer for our own account," and then it continues. And this indicates as principal, we bought from you.

So LBI transferred values. They don't ever suggest were inappropriate, inadequate, unreasonable in exchange for these CUSIPs. And it adds up, if you add up all of these in sums, it's $52 million, because not all of the $63 million worth of securities were ever repo'd to LBI, and therefore, never coming to Barclays. That's an issue known as the eight positions that we never received.

So LBI transfers cash to LBSF, Barclays transfers cash to LBI. That is what happened here, and frankly, on the issue of all of these insinuations and allegations with respect to these transactions, and people working for LBSF were employees of LBI, they have to do better than that. They need to come forward with evidence that would suggest that documents that they've stipulated to their authenticity and to their admissibility, which means that they're admissible for the truth of the matter asserted, are somehow

false and fraudulent.

Do you know how many -- yes, you do know how many creditors and parties in interests would've not -- wanted to know that all of these intercompany repos between LBSF and LBI were sham transactions? That has never been an allegation made in the four years of this bankruptcy. Like it's never been an allegation raised that Barclays somehow got something that they couldn't tell, and didn't properly treat as customer property when it should -- and they treated it as proprietary assets.

And the reason for that is, under the documentation that we lay out in our brief, LBI taking it on a repo, I'm not asking Your Honor, and you don't need to decide the ultimate philosophical question, is it a sale, is it a secured loan. It has aspects of both, okay.

The documentation says that it's a transfer of title, with a sale, with a right to repurchase, for accounting reasons, for tax reasons, it may be treated as a secured loan. But the very acknowledgement that it was on LBI's books and records under the heading RR, reverse repo, means under the master repurchase agreement, explicitly that LBI has the right to unrepo, to repo itself onward to get cash for the security.

And that is true, even though if LBSF called up and said, not just I want to terminate my open repo with you,

but the MRA is very specific. You -- LBI has no obligation to return the security under LBSF tenders the repurchase price, the cash, that it had received whatever months before, weeks before, days before to get back the security.

So statements from Mr. Mitchell like these repos were finished, it created the duty to return. Well, that duty only arises if LBSF were to tender cash. And we've put in evidence before the Court two different sources, the trustee's analysis, preliminary analysis, an Alvarez and Marsal report to the Court and to all the creditors, that as of September 14, 2008, LBSF had all of $7 million of cash on hand.

So the reason that it -- LBSF did not run out and undo all of these repos is not because of collusion and some sort of malfeasance between LBI and LBSF, because of the reality that the whole entity was shutting down. They were not engaging in any new transactions, and certainly not -- well, you would think it appropriate to somehow favor one similarly situated derivative counterparty over all others. To take whatever cash they had and undo that one set of repos for their benefit.

And indeed, on this point, if LBSF had access to the world -- the repo market, other than through LBI, and had repo'd these securities to Goldman Sachs, FirstBank would still be in the same exact position it is today. LBSF

would never have had the cash, would not have had the cash to get them back. They would've had a claim on LBSF, their contractual counterparty, they would've decided to forego that claim. Goldman Sachs would be sitting with securities they hadn't paid for. Barclays has done the exact same thing.

There were some other statements, and I do want to walk you through because I think it is important. I don't think it's legally relevant, and I'll tell you why. All of these emails and what was said and who was talking and in what capacity.

The first thing I would say on that point, Your Honor, is we would direct you to the legal standard, which was again, not addressed. It was asserted that everything is an admission of a party opponent. But in our papers, we cited Judge Kaplan's decision in Faulkner versus National Geographic. And that case holds.

There was a situation where a contract was found to be ambiguous, and therefore, parole evidence was properly considered. And one of the things that the plaintiff tried to introduce was the deposition testimony of various people at the National Geographic, the defendants, who opined that in their view, plaintiff was right on the meaning of this contract, and she probably should win.

And Judge Kaplan said that that was not admissible.

Because it doesn't reflect the position of the parties who negotiated this agreement. It certainly wasn't contemporaneous understanding expressed to the other side. And in any large organization that is careful and diligent, you're going to have a good faith understanding and some people may take a different view.

But what really matters is the position that National Geographic took, vis a vis the plaintiff directly, and formally, and whether that reflects what the contract really means.

So what you have here is a situation, and I'll get -- I want to show you each email and walk you through them. So FirstBank says, Barclays gets the securities as purchased assets, agrees with Weil Gotshal, and let's just be clear, we're talking about the same people who negotiated the clarification letter, who submit the motion to Your Honor to file it, to file the clarification letter and file Schedule A and B under seal.

This reflects the parties' intent. So it comes in as a purchased asset. No question at that point that Barclays understands it can do with it, it's a proprietary asset, that's what it purchased. It doesn't have to hold it for the benefit of anyone. That's the whole point of the proprietary assets. So that was September 22nd, September 29.

Then these emails supposedly people decide, and you'll see why they don't in a minute, we hold this as collateral, it's not clear who we is, but whatever, collateral. And then -- but then Barclays goes ahead and sells it and keeps the proceeds.

This is not consistent. The other thing I want to explain and I will get to it, and let me hand up the emails. I will say this now and I will say it again at the end. FirstBank never contacted anyone at Barclays with -- anyone at Barclays period in, according to the record of everything that's before you until September 2009, long after they had learned from JPMorgan and others that Lehman, LBI had rehypothecated these securities to Barclays. Okay.

That's -- there is not one document in their exhibits or in ours, that shows a communication from FirstBank, a FirstBank representative to people at Barclays directly asking them, by the way, do you know anything about this, until we get the letter saying, we want our stuff back, and then they didn't give us the list of what their stuff is.

So the first email in this series is as they said, David Sullivan and Clifford Chance to Weil Gotshal, I don't think anyone really thought that Clifford Chance, they were talking to Barclays and asking them this question, here are LBSF statements, what can you tell us about this. Find

perfectly appropriate inquiry.

Fifteen minutes later, the next page, Weil Gotshal doesn't reach out to Barclays, it reaches out to -- Barclays' legal department or Barclays' executives, it reaches out to the very people who under the transition services agreement and other arrangements made with the Barclays -- with Barclays for the benefit of the Lehman estate, there were going to be dedicated people to help the estate deal with everything the estates had to deal with.

Can we check whether Lehman still has the collateral described below? The next one, that's simply passing it off to a person who could look it up.

Email four, Allison, we hold the following collateral, and what's significant about this list, is that this is the exact print out from the Lehman records. And, of course, much was made of our expert's concession, if you will, that he conceded that FirstBank was entitled to report these securities on its books.

Well, that's a good thing, because otherwise FirstBank would've been committing securities fraud for the last four years, where they reported it as an asset on their books. They reported it as an asset on its books, because they have a claim against someone to get it back. We say the claim is against LBSF, and that's why they have a right to report it on its books.

So then there's email number five is asking you if this is -- who else's collateral this might be if it's clarified. And email six is uninformative. And so email seven, again, all within the same day, can I share this information with counsel for FirstBank.

Email eight, this is the first -- this is a question, do we know whether these positions are at LBI or had they been rehypothecated. Locke McMurry is an attorney. had they been rehypothecated is important, because anyone looking for possession would need to know that. And he asks the question. He doesn't say, of course they had not, they're sitting right here or whatever.

And then the response to that inquiry. This would be the collateral we know of, we do not know if it is still in the possession of LBI.

Emails 10 and 11 talk about the procedures, and on what capacity LBI at times held collateral for LBSF. LBI was the broker dealer. If LBSF had received securities collateral, somebody with the right plumbing, needed, especially for Fed book entry securities, needed to be involved in that process.

And now the Fiesta Resistance, the thing that was touted as the statement that LBI still holds this collateral. I didn't include it because it wasn't part of the same chain of emails. This is Exhibit 22 to Ms. Cohen's

declaration that supposedly is damning from Robert Lemmons back to David Sullivan at Clifford Chance. My understanding is that Lehman Brothers, Inc. may have the collateral and in the account for LBSF.

Your Honor, I can't tell you, and I've never been able to figure out why someone didn't call Cleary or Barclays' legal and ask about this. But it is undisputed that no one did until September 2009, and it's also undisputed that no one gave, in fact, false information. They thought it might be, but I don't know what you do with may have the collateral.

Certainly no motion was made, or application to the Court was made based on this email, saying, okay, so give it back because it's not yours.

So, Your Honor, I think what you have here, and one last thing on the function of LBI. I mean, look, we are just trying to defend our rights, not have to pay twice for this $50 million of securities we actually received. As to the eight we never received, and there's not a scintilla of evidence that we ever did. I don't know why they are still pushing that, but I think clearly on that, there can be no issue of fact.

But -- and it's not our desire or job to defend LBI and LBSF and everything they did was perfect and that's not our issue. But our issue is that they've not come forward

with the evidence that would be necessary to challenge any of these documents that purport to show what they show, which is a repo at a market price.

Now, this issue about LBI was a custodian and should've known. We've briefed that issue before you. There is no -- the ISDA that they signed, and the CSA that they signed didn't appoint a custodian. It said not applicable.

Even if LBI was acting in that capacity, New York agency law is absolutely clear, acting as an agent does not impose on you liability unless you clearly expressly undertake such liability. Indeed, the whole premise is, if your agent messes up, the principal is liable.

So if agent is agent, LBI had done something if these securities were kept in-house, that was not proper, it's LBSF's liability, not LBI's.

So the fact that LBI was acting as a gratuitous agent without compensation for the -- when these securities were not out in the street, because as we showed in our papers, virtually everyday of every year, since they were posted, they were either rehypothecated to one of LBSF's counterparties, or out on a repo to LBI.

So they -- LBI was never actually acting as custodian for any lengths of time. And the reason -- and but having paid, so the first point is that they are not

bound by any of the terms of the CSA, they can't be said to be the same as LBSF. You can't conflate the two, and decide that they're bound by the restriction that if LBSF had these securities, it could not have done anything with them come the 15th of September, but it didn't.

Just as today, you know, Black Rock has some of the other eight positions. LBSF couldn't do anything about it then because it didn't have the wherewithal to do anything about it.

So the fact that LBI has gone out and paid cash in repo transactions to receive these securities, is not precluded in any way from having it been custodian, doesn't bind it in any way to the terms of the CSA, and doesn't require it to use some sort of clairvoyance in figuring out well, I shouldn’t -- you know, it says reverse repo, that means my computer systems included as things that are eligible to -- on repo. But I should really try to figure out where these come from, because maybe it will reduce some claim in some bankruptcy if I don't use them. That is not the standard.

It's unfortunate for FirstBank it didn't happen, but that's not the standard, and it doesn't make LBI liable, and it certainly doesn't make Barclays liable.

Nobody came to LBI to close out the repo, so LBI was free to use those securities, just like you've read in

the papers in the test cases, and you will hear from that testimony, all of those securities were repo'd to LBI, and many of them were repo'd then to Barclays in the September 18 repo. No one else in four years has come forward to suggest that that somehow is improper.

Indeed, one of the very first matters you had after the sale order was signed, was a creditor running in here named Friedman Billings and Ramsey, if you recall it, on a TRO, and an order to show cause.

THE COURT: I recall it very well, and I remember the argument was down in the auditorium.

MR. MORAG: And they -- it was disposed of on the ground that well, LBI had it under a repo, it was entitled to sell it, and Friedman Billings Ramsey had to withdraw their claim against LBI.

So we are here, not because this is terribly unique, but because they're taking a unique view of the law. But that is neither dispositive, nor critically important. The point is that, Your Honor, there are other people -- there have been other people in similar circumstances, they protect themselves by filing claims.

If they actually added consistent with what you just heard their position to have been, this was never an asset of the estate, that's a great claim on the security -- on the proceeds of the sale. You know, this is not

something you've never considered before.

You had an examiner appointed precisely out of concerns about this issue. There was nothing in the examiner's report on this, or to suggest that there was any issue with respect to LBI's transfer of securities.

So our point is, on that record, of what the Court can take judicial notice of, what the Court has, as part of the law of the case, which again is something that they don't contest that we've argued in our brief, that the Rule 60 decision, the Evergreen Solar decision, the sale order itself, that's law of the case.

And they -- and presentation is made to the Court by fiduciaries, if you want to say they're false, if you've got to do something more than just say they're false. And on a summary judgment record, it's not enough to defeat our motion for summary judgment, for them to say, that they're highly questionable repos.

The employees worked for both companies, or the one company. That's not sufficient. And the other point I would close with, Your Honor, is what we have here is a situation that was anticipated fully in the finance literature. This is -- and this was before, both before the Lehman bankruptcy and particularly -- but also after.

And this is -- we quoted this in our brief in discussing why there is no conversion claim because what

they have is simply a contractual right against LBSF. And this is from the Harding and Christian Johnson text, Mastering the ISDA Collateral Documents, Second Edition, 2012. "By agreeing to a rehypothecation, there is the possibility that the secured party could become insolvent, and therefore, be unable to return the posted collateral after the pledgor has made its payment obligations. The pledgor could possibly end up having met its contractual payment obligations under a transaction, yet not have the collateral returned to it, because it was no longer in the secured party's possession. This is because a pledgor only has a contractual right to the return of the collateral, if it agrees to rehypothecation."

That's what FirstBank did. And it knew how to not agree to rehypothecation when it signed, at the same time, a CSA with Bank of Montreal that specifically said, no rate of rehypothecation. This is -- and that's also precisely why this notice issue is a red herring. They did not get notice. They were not entitled to any notice. LBSF had no obligation under the standard form CSA that every bank on the street uses, to notify FirstBank of a rehypothecation, a repo, selling out right, whatever use might be made of securities collateral. There's no right to notice. There's no right to notice.

So what notice did they want to get? From whom?

So that's why there is no defect in the sale order. That's why the notice argument doesn't work with respect to the binding effect of the sale order. And that's why we think -- I mean, once Judge Daniels said, these assets on the referral motion to the Court, after he was able to consider things outside of the four corners of the complaint, to look at Schedule A, to look at the clarification letter, and said, these assets were ostensibly transferred under the sale order, so what rights Barclays had, and what rights FirstBank has, if any, are governed by the agreement.

At that point, they needed to challenge the sale order in a way that you would challenge a sale order. Which is a Rule 60 motion. This is simply a collateral attack on a sale order, and Your Honor, they knew everything they needed to know to bring that motion in July 2009.

One of the exhibits that we had before you, and I'll get you the number, one second, is the Senior Vice-President of FirstBank telling everyone at FirstBank, Barclays got these securities on September 18th. And he says that at a July 14, 2009 meeting. One year cut off for a Rule 60 motion was September 20th, 2009. This is how you would have to pursue this case.

I understand their argument is that they are -- that these are not purchased assets, but they're wrong on that. Just like Bank of America was wrong that they could

set off against $500 million in debtor property, despite their good faith belief and lawyers telling them that they could presumably.

So that's --

THE COURT: Thanks for validating that bankruptcy court decision.

MR. MORAG: Well, Your Honor, the point was that they -- I'm not validating it. The point was that they found out that they were wrong.

THE COURT: It was appealed and settled, but it's final.

MR. MORAG: It's the procedural posture is the same. They're finding out -- they will find out in the context of this summary judgment motion if they are right or wrong about their argument that it's not a purchased asset.

Unless you have any further questions, I'll sit down.

THE COURT: No, thank you very much.

Do you have anything further?

MR. MITCHELL: I do, Your Honor. That is the nature of litigation, if there's a good faith dispute, you bring a dispute, and it's resolved by a Court because you don't necessarily have to take an adversary's word for it.

I think the September 15th issue is important. I want to point out something to the Court, you don't have to

turn to it, but there's an interesting document. Barclays produced a document, they had a repurchase agreement with Lehman dated December 19, 1996. What's important is the use provision, which was paragraph 8.

And in the Barclays' repurchase agreement with Lehman, Barclays agreed, "nothing in this agreement shall preclude buyer," being the repo buyer, "from engaging in repurchased transactions with the purchase of securities or otherwise," this is important, "selling, transferring, pledging, or hypothecating the purchase of securities." That's the Barclays/Lehman repo.

The master repo agreement between LBSF and LBI does not include the word selling. It says, "Nothing in this agreement shall preclude buyer from engaging in repurchase transactions with purchased securities or otherwise, pledging or hypothecating the purchased securities."

So LBI holding the securities repo'd from LBSF, pursuant to that repo agreement, did not have the right to sell them. They had the right to use them.

So as I said to the Court previously, there's a difference between use and ultimate disposition. So in the hands of LBI pursuant to the plain language of the master repurchase agreement, it did not have the right to sell those securities.

THE COURT: Let's just say for the sake of argument

that you're a hundred percent correct in your conclusion. Where does it take you? Because the assets in question were, in fact, part of the Fed repo, were in fact sold to Barclays, Barclays in fact, holds those securities or has sold them or rehypothecated them, or done whatever they've done with them. The value is assumed to be 50 plus million dollars.

Where does it take you? Because --

MR. MITCHELL: It takes -- I'm sorry.

THE COURT: -- in the argument just made by counsel for Barclays, it's in the clarification letter, it's apparently part of the sale order. And in what way does your argument regarding permitted use improve your legal position relative to the barriers you have to get through?

MR. MITCHELL: First of all, the two bases for it not being a purchased asset, if it's not -- if there's no permitted -- if you can't use it at all after September 15th, if you can't use the collateral, and it's now back as collateral --

THE COURT: But you're kind of missing the essential elements of the argument made in opposition to your position, which is at the time in question, LBSF sits with $7 million in cash, it's not able to perform even if it could perform. The assets have been hypothecated, rehypothecated, transferred, call it what you will, LBI is

using them, and using them as they have historically used these assets to obtain financing. And in Lehman week, that financing was emergency financing offered by the New York Fed. Barclays takes out that position. They have those assets on Schedule A. There's a lot of conflicting dialogue as to where your collateral is, none of which seems to matter as I'm evaluating this.

How do you prove, how do you establish that these are not purchased assets? And how does the argument you've just made regarding limits on use advance your position?

MR. MITCHELL: Your Honor, I'd said to you previously, and I think the Court would agree, two strangers cannot deem something that belongs to you to be subject to another transaction. If I were to agree with Mr. Morag, I deem that, you know, something that is your property, we're going to enter into a transaction, now I claim it is mine, and we sell it. That's in effect, you can't do that.

The only thing that purports to transfer title to the FirstBank's securities, is the allegation that LBI and Barclays in the clarification letter, purported to deem everything on Schedule A to be an asset of LBI, and therefore transferred. That doesn't make it so. The Court has to examine whether in fact it's so.

The only basis for it to be so is the existence of this, what we've had substantial evidence of, non-arm's

length repo from LBSF to LBI. Let's assume they even transferred cash. Of course, the --

THE COURT: There's a confirm that shows cash was transferred.

MR. MITCHELL: This is a self-generated Lehman confirm to itself. So I don't know that the confirm confirms anything, other than what somebody purported to put on a piece of paper. It doesn't show -- there's no bank record that's been submitted to Your Honor showing that actual cash transferred. And --

THE COURT: Are you suggesting as you stand here that you have evidence that that's a sham transaction?

MR. MITCHELL: No. What I'm suggesting to you, Your Honor, is I read the examiner's report, and the examiner's report reflected billions of dollars of account entries back and forth between LBSF and LBI. Cash alone is not the way these parties transacted business.

The notion that the cash balance is the only way to look at this is not accurate. And as I recall the examiner's report, there were net cash -- net account out flows from LBSF to LBI prior to June '08, and then there were net -- the net account entries the other way. So cash doesn't mean dollars. Cash, for purposes of what the Court knows the record in this case to be, are account entries back and forth. So --

THE COURT: The same way that your securities are account entries.

MR. MITCHELL: Well, no, that's -- Your Honor, the difference is when the right to use terminates, there doesn't have to be somebody at LBSF raising their hand and saying, I'm writing you a check to get securities back. It simply is a reversal of the transaction. And the record that exists after the fact is consistent with the notion that that's how that was treated after the fact by the people who knew.

Now, to say, you know, Mr. Morag --

THE COURT: How could you say that there's a record consistent with reversal of the transaction, when in fact, at closing Barclays had the CUSIPs?

MR. MITCHELL: Well, Lehman had --

THE COURT: They're on Schedule A.

MR. MITCHELL: LBI -- but they were using the CUSIPs. Because they were using them. They had a right to use them. Under --

THE COURT: I'm having some trouble with your argument, because you're using what may be completely extraneous and irrelevant jottings in emails, as being inconsistent with Schedule A, which in fact, existed and included the CUSIPs.

MR. MITCHELL: Okay.

THE COURT: And, in fact, what happened transactionally is that on September 18th, Barclays took over the New York Fed repo and your CUSIPs were part of that. That's a fact. And it's indisputable. And how can you possibly get around it?

MR. MITCHELL: Well, first thing, Your Honor, my -- the ultimate transaction is an asset purchase, right. At the end of the day, it's an asset purchase. The repos were unwound. The termination of the repo was unwound, and we end up with an asset purchase.

So we're not talking about a default of a repo. We're talking about an asset purchase confirmed by a bankruptcy court sale order, that can confirm nothing more than assets of the LBI estate.

THE COURT: That's true. But what actually happened here and it was all happening very quickly, is that the repo transaction took place on September 18th, the sale hearing took place on September 19th into the early morning hours of September 20th, and the transaction closed with a clarification letter as of September 22, that Monday. I'm very familiar with the timeline.

I'm also familiar with Schedule A. What I'm not familiar with is how you can be using miscellaneous shards of information to somehow contradict some obvious facts which obviously doesn't work to your position, but the

assets are in Schedule A.

You may say they never should have been on Schedule A, you may say that it was your property that was misappropriated in putting it in Schedule A. You may say as a matter of law that LBI didn't have, at that time, the legal capacity to sell, and it shouldn't have been deemed purchased assets. But this litigation isn't the way to get to that result.

In fact, it's final. And it's final because of the sale order. And it's final because of the 60(b) litigation. And it's final because it's been going on for literally more than four years.

And so this really does seem to be a collateral attack against the purchaser that obtained in a sale order appropriate language to protect it against this kind of collateral attack. And also, your client for whatever reason, appears not to have taken appropriate steps to protect itself either in this bankruptcy case or the related SIPA proceeding involving LBI. I can't imagine why it didn't, but it didn't.

MR. MITCHELL: It did, Your Honor. That's not true.

THE COURT: What did it do?

MR. MITCHELL: After -- let's go back and look at -- you know, Mr. -- if you accept --

THE COURT: Tell me what your client did to protect itself.

MR. MITCHELL: It filed a claim in the LBI -- after receiving all of this information, it filed a claim in the LBI bankruptcy case.

THE COURT: But its counterparty is LBSF.

MR. MITCHELL: But it discovered -- it learned that its property was at LBI. We also now know that at the securities --

THE COURT: Its property was at LBI for a Nano second during this bankruptcy. It moved on September 18.

MR. MITCHELL: LBI was -- Your Honor, there is a -- first of all, all of this property was at LBI. That's where the property resided. There was an account number for LBI.

THE COURT: But it's counterparty was LBSF. Its claims belonged as against LBSF. LBI may have been a custodian, but the property wasn't there.

MR. MITCHELL: Your Honor --

THE COURT: The only kind of claim that could have been made that would have been a meaningful claim would be a customer claim. But a customer claim against LBI would be meaningless because there was no property to return.

MR. MITCHELL: Well, Your Honor, I thought if there was an issue here with respect to the transaction, I thought there was an issue of a sale of assets from LBI to LBSF to

LBI.

So the question Your Honor asked, what did your client do. What my client did, is my client did file a claim in the LBI bankruptcy. What happened subsequent to that is the lawyer who filed the claim changed firms, filed a notice of change of counsel. When the claim was denied, instead of sending the denial to the new firm, it went to the old firm. The lawyer wasn't at the old firm. And notice of that claim denial was never received by FirstBank because it was sent by the trustee to the wrong place. That's the subject of a separate motion before Your Honor. But my client did try to protect itself in the bankruptcy following all of the information that it was receiving, by communicating with the trustee, and with Weil Gotshal.

So it was trying to protect itself. Whether Your Honor agrees with Barclays that its only possible way to go was to file a claim in the LBSF bankruptcy, which I contend to the Court is inconsistent with the claim that it's my property. We can disagree on that in terms of that issue --

THE COURT: We can and do disagree on that.

MR. MITCHELL: I understand. Then you can --

THE COURT: Virtually every other counterparty on the planet filed claims in the LBHI and LBSF cases to the extent that they arose out of ISDA agreements.

MR. MITCHELL: So they became -- so parties who may

have had a claim of right to collateral, 100 percent, become unsecured creditors receiving less than a hundred cents on the dollar because they voluntarily converted themselves into unsecured claimants as opposed to claiming their own property back. But there are other ways to proceed in a particular case.

I can only tell you that there is nothing improper that I see, in the notion that certainly with the record that was available to FirstBank, that it pursues a claim to receive its collateral. Because there's no doubt it was collateral.

And what comes out in discovery in this case, only in discovery in this case, is the existence of the repo. I do not see in any record in any case, any discussion of LBSF to LBI repos of counterparty collateral. I've never seen it discussed. I've never seen the import of that discussed. The Court has never ruled upon it. This would be the first case in which the Court has done so.

We certainly have a right to have the Court rule on something like that, what is the import of it and why. We have pointed to the Court reasons why it should not necessarily be taken that way, but there is no res judicata law of the case on the Court ruling, that these LBSF to LBI repos about which the Court was unaware at the time it issued the sale order, or the be all and end all of why it

becomes property of the estate. And whether, in fact, it is so, notwithstanding the fact that LBI never treated these as an outright sale, that LBI has the authority and right, even though it books it as a secured loan to sell somebody else's property as its own in a liquidation sale. There's no ruling on that in any case. I've never seen a ruling on that.

And as I say, Your Honor, you know, to call us to task for challenging something that we -- there's no doubt if you take a step back from this, this was collateral for us. Collateral for us is not a claim against LBSF. Maybe in the course of discovery in this case, facts are adduced that the Court has never addressed, that we certainly think are facts that should be addressed by the Court.

Maybe Your Honor agrees that the LBSF to LBI repo changes everything, but this would be the first time you've ever said that. So from the standpoint of what this case is and what this case was when we filed it, it was a claim that we had collateral posted, that collateral was ours, it was not part of the estate, and that is the law. I'm not making the law up, collateral doesn't belong to a debtor. You can't sell somebody else's property. You can't deem it to be yours.

With respect to what we did to protect ourselves. Mr. Morag, his Exhibit 12 that read, you know, oh, they're

writing to people, Locke McMurray at Barclays.com. The heading is collateral inquiry by FirstBank of Puerto Rico. Answer, "LBI holds collateral for LBSF pursuant to the attached control agreement, one for each affiliate. Dan might be able to tell us the exact title of the accounts, but LBI acts exclusively for LBSF pursuant to this agreement."

With respect to the FirstBank collateral, what does FirstBank do? It files a claim in the LBI bankruptcy. So it's inquiring what to do. It's not true that we sat on rights.

You know, you can make these grand statements, but there is a record in this case. Subsequent to all this, LBSF negotiated with FirstBank for months. They went back and forth. The record is before you on close-out figures to give us our collateral back.

At the end of the process, the only communication was, we don't have your collateral, not that Barclays has your collateral. FirstBank goes to JPMorgan, says where did the collateral go, we'd like to know where the collateral is. JPMorgan doesn't say anything. We file a 2004 motion in August. The 2004 motion is never heard, because finally they say Barclays has it, and we make a demand of Barclays.

We didn't sit on our rights. That's just not true. So there's a record here, Your Honor. At a minimum, this

should go to a jury or a trier of fact to decide this on the merits. There are facts here. This is -- the clarification letter is not an abundance of clarity. What is clear is paragraph 21 says, ISDAs are not included.

Our CSA is connected to an ISDA. It's not an included asset. It's an excluded asset. It's plain as day. So to say we should have, based upon the record that existed, made a claim in the LBSF bankruptcy is self-serving. It's not mitigation of damages. It's none of the thing.

Damages, mitigation of damages is when you do something to exacerbate your damages. I make it worse. The claim is, we had a -- let's say we even had a claim against LBSF, we may have a variety of claims against different parties. But certainly our claim against LBI with what we now know under the securities account control agreement, we had an account with LBI, designated specifically to us. But we never had a chance to challenge that because they sent the notice denying the claim to the wrong place. That's the subject of another motion before Your Honor.

THE COURT: Your argument --

MR. MITCHELL: So we did what --

THE COURT: Your argument is passioned, but it does not change the fact that most institutions in your position having LBSF as its counterparty in fact filed claims in the

LBSF case, and received distributions I might add.

So part of the problem here is self-imposed. The choices that were made by your client and predecessor counsel are what they are, but in effect, you have boxed yourselves. Because now your best argument is against a good faith purchaser for value.

MR. MITCHELL: If Your Honor concludes its purchased asset, then obviously -- then that changes the equation. If it's not a purchased asset, then they're not a good faith purchaser for value, the UCC doesn't apply. And the question is, is it a purchased asset, could it be a purchased asset, and I daresay, Your Honor, that this case presents to the Court facts that have never before, to my knowledge, been presented to the Court in connection with this proceeding.

Other cases are not -- you've not seen on a full record the situation that's present here. You haven't. And there's no ruling on anything that's consistent with this. And we have a right. It's not an affront to the system, it's not an affront to the sale order, no affront is intended, because the notion that collateral doesn't belong to a debtor is hardly controversial.

So it would be an appropriate claim to say it's not an asset of the debtor, therefore, you didn't acquire it, Barclays is the appropriate defendant. The facts here, at a

minimum, are murky. I mean, there's no -- to just completely ignore the string of emails which are connected to us because they're precipitated by our inquiry. They contain headings on emails that say FirstBank Puerto Rico, and they precipitate after responses are given, action. We file a claim in the LBI bankruptcy.

LBSF files a claim on our behalf in the LBI bankruptcy. LBSF negotiates with us to return our collateral. What do all those facts mean?

In order to say -- Mr. Morag, to come up here and say, this is absolutely abundantly crystal clear --

THE COURT: That's what you said during your argument.

MR. MITCHELL: No, it's crystal -- I said it's crystal clear that they can't say that for their side of the case, because you can't explain all this away. Why is no one saying --

THE COURT: You actually pointed --

MR. MITCHELL: -- nobody knew it was on Schedule A?

THE COURT: You actually pointed me to a paragraph of the clarification letter and suggested that it was crystal clear that this was not a purchased asset.

MR. MITCHELL: Right.

THE COURT: Both of you are engaged in what litigators do all the time, taking what you now say is

murky, and saying that it's clear, when it suits the purposes of your argument. The point is, and I'm not pressing you or calling you to task, that you have an extraordinarily weak position. I'm taking it under advisement.

MR. MITCHELL: Thank you, Your Honor.

(Proceedings concluded at 4:51 PM)

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C E R T I F I C A T I O N

I, Sheila G. Orms, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

Dated: January 18, 2013

Shelia G. Orms

Digitally signed by Shelia G. Orms
DN: cn=Shelia G. Orms, o=Veritext, ou, email=digital@veritext.com, c=US
Date: 2013.01.25 16:02:42 -05'00'

Signature of Approved Transcriber

Veritext

200 Old Country Road

Suite 580

Mineola, NY 11501